TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~564~~ 153.

BARING BROTHERS & CO., MARIA SIMONS, J. V. BOWLEY, EXECUTRIX, ETC., EDMUND BOWLEY, HER HUSBAND, AND A. V. DAWSON, PLAINTIFFS IN ERROR,

vs.

DABNEY, MORGAN & CO., THE BANK OF THE STATE OF SOUTH CAROLINA, THOMAS R. WARING ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MARCH 19, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 364.

BARING BROTHERS & CO., MARIA SIMONS, J. V. BOWLEY, EXECUTRIX, ETC., EDMUND BOWLEY, HER HUSBAND, AND A. V. DAWSON, PLAINTIFFS IN ERROR,

vs.

DABNEY, MORGAN & CO., THE BANK OF THE STATE OF SOUTH CAROLINA, THOMAS R. WARING, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 *Caption.*

STATE OF SOUTH CAROLINA:

At a supreme court begun and held for the State of South Carolina, at the April term, of 1871, of said court, present and presiding the Honorables F. J. Moses, chief justice, and A. J. Millard, and J. J. Wright, associate justices of said court, the following proceedings were had upon the transcript of the record from the court of common pleas, for the county of Charleston, in the first circuit of said State, in the case of Dabney, Morgan & Co., against The President & Directors of the Bank of the State of South Carolina and others; which transcript is in the words following, to wit:

2 THE STATE OF SOUTH CAROLINA,
Charleston District:

In equity.

To the honorable the chancellors of the said State:

Humbly complaining, show unto your honors, your orators, Charles H. Dabney, John P. Morgan, James J. Goodwin, and George H. Morgan, merchants, trading and doing business under the name, style, and firm of Dabney, Morgan and Co., in their own behalf, as holders of notes and bills of The President and Directors of the Bank of the State of South Carolina, and of all others with them, who will come in and contribute to the expenses of these proceedings, that, heretofore, to wit, in the year of our Lord one thousand eight hundred and twelve, the State of South Carolina, by an act of the legislature of the said State, and which then was the appropriate department of its State government, competent for that purpose, and which was entitled "An act to establish a bank on behalf of, and for the benefit of, the State," did establish a bank as expressed in the said act, on behalf, and for the benefit of the State. And in the said act, it was provided, that all the stock belonging to the State, of all descriptions whatsoever, shall constitute and form the capital of the said bank, and shall be vested in the president and directors, to be appointed in the manner which was by the same act prescribed. And it was therein further declared, that the faith of the State should be, and thereby , pledged for the support of the said bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency. All unexpended money in the treasuries of the State, and all taxes thereafter to be collected, were directed to be deposited in the said bank, and to aid and facilitate its operations. It was in the said act also provided that a president and twelve directors should be elected by joint ballot, by the legislature, to serve for one year; that the president and directors so elected, shall have power to elect and remove a cashier, and appoint all clerks and officers necessary for executing the business of the corporation. That the bank so incorporated, should be, and was thereby, declared a body politic, by the name and style of "The President and Directors of the Bank of the State of South Carolina," and capable in law to have, purchase, receive, possess, enjoy, and to retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of what kind, nature, or quality soever, and the same to sell, grant, aliene, demise or dispose of; to sue and be sued, implead and be impleaded, answer and be answered, defend and be defended in courts of record, or any other place whatsoever; and

also take, have, and use a common seal, and the same to break, alter and renew at their pleasure; and also to ordain, establish, and put in execution, such by-laws, ordinances, and regulations, as shall seem
3 necessary and convenient for the government of the said corporation—not being contrary to law or the constitution thereof, and generally to do and execute, all and singular such acts, matters, and things, which to them shall or may appertain to do: subject, nevertheless, to the rules, regulations, restrictions, limitations, and provisions prescribed in the said act. And in and by the said act the president and directors aforesaid, were invested with power to issue notes, signed by the president and countersigned by the cashier, not under the denomination of one dollar, for such sums and with such devices as they may deem most expedient and safe. And they were further made capable of exercising such other powers and authorities, as may be necessary for the well governing and ordering the affairs of the said corporation, and promoting its interests and credit; any law, usage, or custom to the contrary, notwithstanding. And it was by the said act further declared, that bills, obligations, and credit, under the seal of the said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, and if his, her, or their assignee or assignees, and so as absolutely to transfer and vest the property thereof, in each and every assignee or assignees successively, and to enable such assignee or assignees to bring and maintain an action thereupon, in his, her, or their own name or names. And bills or notes which may be issued by order of the said corporation, signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person, or persons, his, her, or their order, or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same, in the like manner, and with the like force and effect as upon any private person or persons if issued by him, her, or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by any private person or persons, that is to say: those which are or shall be payable to any person or persons, his, her, or their order, shall be assignable by endorsement in like manner, and with the like force and effect as foreign bills of exchange now are, and those which or shall be payable to bearer, shall be negotiable and assignable by delivery only. It was also, by the said act further provided, that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the State, either at Charleston or Columbia, and by all tax collectors and other public officers, in all payments of taxes or other moneys due to the State.

And your orators ask leave to refer to the said act, which is a public act, and to all other acts of the legislature of the State, which in
4 any manner amend or change the said act, or affect the purposes, powers, management or direction of the said bank, whenever the same may be necessary.

Your orators further show unto your honors that, in the year of our Lord one thousand eight hundred and thirteen, another act was passed, entitled An act to explain and amend an act, entitled "An act to establish a bank in behalf of, and for the benefit of the State," in which it was, among other things, provided that no other bank or banks, other than the bank of the State of South Carolina, shall issue or put into circulation, bills of a lower denomination than five dollars.

Your orators further show unto your honors that, in the year of our Lord one thousand eight hundred and fourteen, the said act of one thousand eight hundred and twelve, was again amended, in which, among other things, it was provided, that the said bank should be authorized and required to issue bills of a less denomination than one dollar; that no body, politic or corporate, within the State, should be allowed to issue any bills of credit in the nature of a circulating medium or other bills than such as answer the denomination of contracts, under the penalty of ten dollars for each and every dollar issued, with an exception of banking corporations already chartered.

Your orators further show unto your honors that, in the year of our Lord one thousand eight hundred and thirty-three, the charter granted in one thousand eight hundred and twelve was renewed until the 1st day of May, in the year of our Lord one thousand eight hundred and fifty-six. And that at the expiration of the said time, the charter of the said bank was further extended to a certain period, which would expire and be ended in the year of our Lord one thousand eight hundred and seventy-one.

Your orators further show unto your honors that, the said corporation styled "The President and Directors of the Bank of the State of South Carolina," in pursuance of the purpose with which it was chartered, and in the execution of the powers given to it, has, at divers times, issued its bills and notes, signed by the president and countersigned by the cashier, of various dates and denominations, in which it became bound to pay to the bearer of the said bills or notes, in gold or silver coin, the amount in the said bills or notes severally, named; that such bills or notes constituted a part of the circulating medium of the country; that they were accepted as payable in gold or silver; were issued, circulated, and received as money, for the redemption of which, the said corporation known as "The President and Directors of the Bank of the State of South Carolina," was bound to make them good on the demand thereof, by the bearer or the holder; that, in addition thereto, the faith of the State was pledged for the support of the bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency.

5 Your orators further show unto your honors that, as they are informed and believe, the public stock and securities of which the capital of the said bank consisted at the time when it was chartered, have been disposed of and converted for many years past into money, with which its banking operations have been conducted.

Your orators further show unto your honors that by divers acts of the legislature of the State of South Carolina, additions have been made to the banking capital of the said bank, and they have understood and believe that for various matters for which the State of South Carolina has pledged its faith, and made its guarantee since the time when it gave a charter to the said corporation, the said President and Directors of the Bank of the State of South Carolina, have been required by the acts or resolutions of the legislature of the said State, to protect that faith, and fulfil the obligations of such guarantee.

Your orators further show unto your honors that they have understood and so believe, that among the cases and the modes in which the State of South Carolina has so pledged its faith, and given its guarantee, are bonds of certain corporations with the endorsement of the State aforesaid, in the way of guarantee of such bonds of certain railroad corporations, chartered by the authority of the legislature of the State of South Carolina, and also in subscriptions to the capital stock of some

of the roads. That, in other cases, the faith of the State and its guarantee, has been given to other obligations required for the relief of the people of the said State. That among these was a debt for rebuilding the city of Charlestown, the payment of which was secured by the special guarantee of the State of South Carolina, and that a portion of the amount raised by the sale or negotiation of the said bonds, known as the "fire-loan bond," went into the capital of the said bank by the authority of the State aforesaid.

And your orators are further informed and believe that the said banking corporation, known as "The President and Directors of the Bank of the State of South Carolina," has made, during its existence and operation, large sums of money, which it has applied towards the payment of a large portion of the public debt of the State of South Carolina. And your orators have been informed and believe that the amounts which have been paid by The President and Directors of the Bank of the State of South Carolina, towards the public indebtedness of the State of South Carolina will not fall much short, if it will not exceed, the sum or sums of money, whether contributed as such, or in the form of public or private securities, to the said corporation, "The President and Directors of the Bank of the State of South Carolina."

6 Your orators further show unto your honors that "The President and Directors of the Bank of the State of South Carolina," under the charter as hereinbefore stated, granted by the legislature of the State of South Carolina, have, from time to time, issued large amounts of notes and bills, which have obtained a wide circulation, professing, as they did, to be redeemable by the said "The President and Directors of the Bank of the State of South Carolina," in gold or silver coin, issued upon a capital which had been contributed by the State of South Carolina as the capital of said bank, secured by the pledge of the State at the time when the bank was incorporated; that the faith of the State was pledged for the support of the said bank, and to supply any deficiency in the fund specifically pledged, and to make good all losses arising from such deficiency. And that this was the justification of the declaration of one of the presidents of that bank, that the bank had in its nationality, as the institution of the State, a vast source of strength.

Your orators further show unto your honors that, relying with full faith and confidence upon the resources of the corporation known as "The President and Directors of the Bank of the State of South Carolina," to fully meet, pay, and discharge its liabilities to all persons who were the holders of its bills and notes, issued by it, under the provisions of its charter and relying with the like faith and confidence upon the pledge of the State of South Carolina that its public faith should be given to the support of the said bank, to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency; they have received and now own bona fide, a large amount of the bills and notes issued by "The President and Directors of the Bank of the State of South Carolina," and that the bills and notes so held by them, amount to the sum of two hundred and fifty thousand dollars, ($250,000.) That they have requested the said "The President and Directors of the Bank of the State of South Carolina," to discharge the obligation of the said bills and notes so issued by the said "The President and Directors of the Bank of the State of South Carolina," according to the legal obligation and effect of such bills and notes, by payment in gold, silver, or other legal tender. Your orators further show unto your honors, that the amount of the notes and bills of the

Bank of the State of South Carolina now held by them is, as has been stated, of very large amount and greatly more than the value of any assets of the said bank which can be reached by process out of a court of law. That of the total amount of the bills and notes issued by "The President and Directors of the Bank of the State of South Carolina," they have no knowledge, nor are they able to obtain definite information thereof; but they are informed and believe that, if the resources of

7 "The President and Directors of the Bank of the State of South Carolina," consisting almost exclusively of equitable assets, were properly applied to the discharge of the obligations for which they are bound in good conscience and equity, as well as by the pledge given by the State aforesaid, when the power was given to "The President and Directors of the Bank of the State of South Carolina" to issue notes and bills, such resources would be equal to the payment and discharge of all persons holding bills or notes issued and put in circulation by "The President and Directors of the Bank of the State of South Carolina."

Your orators further show unto your honors that, in reply to the application they have made to "The President and Directors of the Bank of the State of South Carolina," to pay, discharge, and redeem the notes and bills of "The President and Directors of the Bank of the State of South Carolina," held by your orators for the payment, discharge, and redemption of which the capital of the said corporation known as "The President and Directors of the Bank of the State of South Carolina," was bound in addition to the pledge of the faith of the State to support the said bank and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency, they had been informed by the president and cashier of the said bank that the notes and bills of "The President and Directors of the Bank of the State of South Carolina," could not be paid, discharged, or redeemed according to the obligations involved in the issue of the same and in accordance with the pledge of the State of South Carolina, made in that behalf, because the legislature of the State of South Carolina, had, in the year of our Lord one thousand eight hundred and sixty-five, by a special enactment, authorized and required the president and directors to collect the assets and property of the bank and hold the same specially appropriated and to be applied—first, to the payment of the principal and interest of the bonds known as the fire-loan bonds payable in Europe; second, to the payment of the principal and interest of the fire-loan bonds payable in the United States; and third, to the redemption of outstanding notes hitherto issued by said bank. And that, at the same time, the legislature of the said State, did further, by its enactment, declare that all the agencies of the bank, known as "The President and Directors of the Bank of the State of South Carolina," should be closed, and the principal bank in Charleston should cease to be a bank of issue, but continue to act as a bank of deposit until the further action of the legislature, with various other provisions and requirements, in relation to the business and management of the said bank.

Your orators charge that this enactment of the legislature of the State, so far as it controls the conduct of "The President and

8 Directors of the Bank of the State of South Carolina," and forces an application of the property and assets of the bank to the purposes and in the manner indicated, is not only, so far as the just claims of your orators are concerned, contrary to equity and good conscience, but is, moreover, the exercise of a power by which a control is asserted

in the appropriation of the property, and assets of the bank, in a manner not consistent with *with* the first obligation of the bank. That the two first classes of creditors to which the legislature of the State thus appropriates the property and assets of the bank, are not the creditors of the bank, but of the State of South Carolina, as the guarantor of the bonds of the city council of Charleston, secured by mortgages of property in the city of Charleston, while your orators are the creditors of the bank because of its bills and notes. That, moreover, such authority so attempted to be exercised by the legislature of the State of South Carolina, was and is in plain violation of the Constitution of the United States, which has provided that no State should pass a law impairing the obligation of contracts. And your orators now show that the enactment of the legislature of the State of South Carolina hereinbefore referred to, not only affects the pledge of the State in the charter given to the said bank, in the year of our Lord one thousand eight hundred and twelve, a pledge upon the faith of which those who took the notes and bills of the bank rested, in a great measure, for protection, in addition to the property and assets of the bank, but that the legislature of the State now attempts to take away from the proper creditors of the bank the property and assets of the bank itself, and forces the application and the distribution thereof among those who are not the proper creditors of the bank, and who, because of the nature of the indebtedness due to them, would have their remedies adequate and sufficient against other parties upon whom your orators cannot call.

Your orators further charge that the amounts realized from the bonds which are set forth, in the first and second class of creditors especially named in the enactment of the legislature of the State of South Carolina, as they are informed, did not, but for some portion thereof, how much they do not know, become incorporated with the capital of the said bank. That whatever may be the amount thereof, it was added to the capital of the said bank, and became an increase of its capital by the will of the State. And when it became incorporated with the capital of the said bank, it became affected by and was embraced in the pledge of the State made in one thousand eight hundred and twelve for the support of the said bank; that such increase for whatever amount it was so made, was made by the act of the State itself; that it was intended, when so made, to increase the amount of business done by the said bank, and particularly by the increase of its capital, to justify
9 a corresponding increase of its circulation. It was adding to the capital to increase the business of the bank, of which the profits belonged to the State; and when so added to the capital of the bank, became as much liable to those who were then and thenceforth dealing with the bank, and receiving and holding its bills and notes, as did the original capital advanced by the State to the bank; and when thus added to the capital of the bank, and by the act of the State itself, made the basis of the credit of the bank. In its issue of notes and bills the legislature of the State had no power to withdraw it from the claims of those who trusted to it. That the profits derived from the capital, in whatever advanced by the State to the bank, was that to which the State had a right. The profits realized by the contribution of the property of the State to the operations of the bank, was the return to the State for the advances so made. These profits were the result of the credit of the bank. And no principle would be less sustained by any rule recognized in this court than that they who, by the action of the State, were induced to rely upon the credit of the bank, and the capital contributed to it by the State could, by the act of the State, be deprived

of all benefit or claim upon the property and assets of the bank, and that the same and every part thereof should be by the action of the State, removed from the claim of those who had trusted to it, and be transferred to the discharge of claims against the State, to which the bank was not a party, and for which it was not bound.

Your orators further charge that they are informed and believe, the profits which have been received by the State from the operations of the bank, have been very large, and have greatly assisted the State in the discharge of its public debt; that, in addition thereto, the bank has advanced large sums of money to the State for various purposes, which have been required for the State, and that upon an account stated between the bank and the State, a large amount of indebtedness would be found from the State to the bank. That if this were otherwise the State would not have the right to dispose of the property and assets of the bank, to the prejudice of the creditors of the bank; that such an act becomes more wrongful when with an indebtedness, as your orators are informed, from the State to the bank, which, if discharged, would greatly relieve the indebtedness of the bank to those who are its creditors. It is yet attempted to take from the creditors of the bank the property and assets which belong to the bank, for the payment of those who are not creditors of the bank, but of the State, and to the prejudice and damage of those who only are the proper creditors of the bank.

Your orators further charge that the legislature of the State of
10 South Carolina, when it authorized, as it did by its act passed in the year of our Lord one thousand eight hundred and thirty-five, a loan to be effected for rebuilding the city of Charleston, did declare that the faith and the funds of the State of South Carolina, should be, and the same were thereby, pledged to secure the punctual payment of the said bonds or contracts, with the interest thereon, and that the money when realized should be deposited in the Bank of the State of South Carolina, and shall become part of the capital thereof. That in the same act regulations were made providing for the lending of the sum, directed by the said act to be raised, to persons who should be applicants therefor. That such persons were required to give bond and security by way of mortgage for the repayment of the said loans; and that before the said loan was effected, the city of Charleston should, by an ordinance, to be duly ratified by the city authorities, guarantee the State against all loss to arise from loans to be made to the citizens of Charleston, under the authority of this act.

Your orators charge that if the said loan has been negotiated, that, for all sums advanced or loaned by the bank to the parties for whose benefit the said loan was negotiated, there was ample security provided for the repayment thereof, and that such securities should be exhausted before the parties who originally advanced the money, and are designated and known as the holders of the fire-loan bonds, could claim even with those who are creditors of the bank to share with them in the distribution of its assets. And they submit that even then they could not so claim, unless the State, while it would assert a right to control the appropriation of the property and assets which belonged to the bank, and, therefore, to its creditors, would admit its liability to the creditors of the bank in accordance with its pledge.

And your orators charge that the State of South Carolina, as they are informed, does not admit its liability to the creditors of the bank. That they cannot sue the State, nor make it in any way a party to these proceedings. And that thus the action of the legislature of the State

takes or attempts to take away from them the only property and assets from which, as the holders of the notes and bills of the bank, they can expect or derive any satisfaction or payment of their demands as creditors of the bank.

Your orators further charge that the said act of the legislature is not only unconstitutional, because, in fact, it is intended to operate to impair the true obligation of that contract, which, as the holders of the notes and bills of the bank, and, therefore, as creditors of the bank, they have with that bank, which, as a corporation, is known as "The President and Directors of the Bank of the State of South Carolina," not only against equity and good conscience, because it makes an appro-
11 priation of the property and assets to the great prejudice and wrong of your orators; but that it is moreover void, because it is in violation of the laws of the United States, approved the 2d March, anno Domini one thousand eight hundred and sixty-seven, entitled "An act to establish a uniform system of bankruptcy throughout the United States." That whenever "The President and Directors of the Bank of the State of South Carolina" shall act in accordance with the directions of the legislature of the State of South Carolina, such act will then be such a disposition of the property and assets of the said bank, as is prohibited by the law of the United States now referred to.

Your orators further charge that if it is said that the bank is debtor to the State for the sum and sums of money in whatever manner derived, and which constitutes the capital of the said bank, such claim, according to the well understood principles of this court, must be postponed to the claim of your orators as creditors of the said bank. And that if the holders of the fire-loan bonds are at all entitled to share in the distribution of the property and assets of the bank, they can only come in with other creditors in a rateable distribution thereof.

And your orators further charge, that, under the 11th article, in addition to an amendment of the Constitution of the United States of America, which has provided that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, they have no power by any proceedings which they can adopt either at law or in equity, and which can be made to operate directly upon the State, restrain or prevent, by the order or decree of any court, the disposition of the property and assets of the said bank. And that the president and cashier, the directors, and all other persons instructed with or concerned in the management of the said bank, are bound to obey, unless they are restrained and otherwise ordered by this court, such order and direction as the legislature of the State may make touching the disposition of all the property and assets of the bank.

And your orators further charge that, not only is the large amount of the property and assets of the bank equitable assets, not within the control of a court of law, nor in any manner subject to the process thereof, but, on the contrary, the administration of which belongs exclusively to a court of inquiry, but that so much of the property and assets of the said bank as consists of real or other tangible property, and as would be, if it continued in the possession of the said bank and was held not to have passed and been disposed of by the act of the
12 legislature hereinbefore referred to, although of inconsiderable value, cannot be made liable to the claim of your orators, except through the action of this honorable court.

And your orators have often and in a friendly manner applied to "The

President and Directors of the Bank of the State of South Carolina," and requested them to redeem the notes and bills of the said bank, held by your orators, in gold or silver coin or other legal tender; or if unable to do so, that they would call in the holders of the notes and bills of the said bank, and such other creditors of "The President and Directors of the Bank of the State of South Carolina," as would be entitled, and among the parties so entitled, make just and equitable distribution of the property and assets of the bank.

And your orators had well hoped that such reasonable request would have been complied with. But now so it is, may it please your honors, that the said "The President and Directors of the Bank of the State of South Carolina" refuse to comply with such, the reasonable request of your orators. And the said "The President and Directors of the Bank of the State of South Carolina," will sometimes pretend that your orators are not possessed of the bills and notes of the said bank, as they have herein alleged; the contrary whereof, your orators charge to be true, and insist that the bills and notes of the said bank of the amount they have hereinbefore set forth, are their property, and are in the possession of your orators' solicitors, ready to be produced as this honorable court shall direct. And then again, the said "The President and Directors of the Bank of the State of South Carolina," will sometimes pretend that your orators are not bona fide entitled to the bills and notes in their possession. The contrary, whereof your orators allege to be true, and insist that they are the lawful owners and holders thereof, and are entitled to demand and recover the same. And then again, they will pretend that they have no capital of the said bank. The contrary thereof, your orators allege to be true, and insist that the capital of the said bank is able to pay and satisfy to your orators, the full and just sum of the bills and notes in their possession. And then again, they will pretend that the legislature of the State of South Carolina has, by special enactment, commanded the disposition to be made of the property and assets of the said bank, including its capital, and such disposition they are bound to carry into execution. The contrary whereof, your orators charge to be true, and allege that the legislature of the State of South Carolina had no legal right or constitutional power to impair, or in anywise affect the rights of the person or persons holding the notes or bills of the said bank, by interfering in any way with
13 the capital of the said bank, its property or assets, so that the same should be in anywise diverted from its just liability to the creditors of the said bank, who are, as your orators are, holders of its notes and bills, for the payment of which the capital of the said bank was specially pledged; and that the attempt of the legislature, if accomplished, would be in violation of the Constitution of the United States, in thus impairing the obligation of the contract resting upon the said bank, and by it made with those who held its bills and notes issued by it under the powers given by its charter, secured by the capital and the faith of the State, and for the redemption of which bills and notes, its capital was thus plainly and positively pledged. And then again, the said "The President and Directors of the Bank of the State of South Carolina," will sometimes pretend that the order or direction of the State, as pronounced by the act of the legislature, is a law which they must obey. The contrary whereof, your orators charge to be true, and allege that the President and Directors cannot obey the directions of the legislature in this behalf, because the same are unconstitutional, and cannot justify the conduct of those who are in charge of the property and assets of the said bank, if obedience to that direction involves

the withdrawal of the capital of the bank from those who are its creditors, and for whose claims the capital was pledged. And then again they pretend that the corporation known as "The President and Directors of the Bank of the State of South Carolina," no longer exists as the same corporation by which the bills and notes now owned by your orators were issued. And your orators insist that without undertaking to decide whether the said corporation is or is not dissolved by any act of the legislature of the State of South Carolina, that, nevertheless, its property and its assets, including therein its capital, is now in the hands of Charles M. Furman, who is, or was, the president of the said bank, and of Thomas R. Waring, who was, or is, the cashier of the said bank, and that if, by the act of the legislature of the State of South Carolina already referred to, the property and assets of the corporation known as "The President and Directors of the Bank of the State of South Carolina," has been changed from the custody and control of the said corporation, they are still in the hands and under the control of the said Charles M. Furman and the said Thomas R. Waring, with the knowledge on their part that they are the property and assets of the Bank of the State of South Carolina, constituting its capital, pledged for the payment of the bills and notes issued by that bank, and the only fund or source which, by process out of a court of competent jurisdiction can be made available for the payment of the bills and notes issued by and the proper debt of the said bank. And then again, they will pretend that there is no property nor assets liable to or which can
14 be applied in payment of the bills and notes issued by the said bank. The contrary whereof your orators charge to be true, and allege that there is a large amount of property and assets of the said bank, in the possession and under the control of the said bank, or if not in the possession and under the control of the said Charles M. Furman, now or formerly the president of the bank, and of the said Thomas R. Waring, now or formerly its cashier, and which, if applied to the payment of the bills and notes of the said bank, would pay and satisfy the same or those which belong to and are claimed by your orators.

All which doings, actings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

To the end, therefore, that the said "The President and Directors of the Bank of the State of South Carolina," Charles M. Furman and Thomas R. Waring, and such others, as when discovered may be proper parties to the bill, and so made by the order or decree of this honorable court, may full, true, direct, and perfect answer make to all and singular the premises, and particularly that they may set forth and discover whether "The President and Directors of the Bank of the State of South Carolina," was not, by an act of the legislature of the State of South Carolina, incorporated, with all the powers, privileges, rights and obligations hereinbefore set forth; whether so incorporated and in the exercise of its powers thereto given, it did not, from time to time, issue its bills and notes payable to bearer, and redeemable in gold or silver; whether by its charter the capital of the said bank was not pledged for the redemption of the notes and bills so issued by it; whether the legislature of the State, by the act hereinbefore referred to, has not directed the property and assets of the said bank to be applied to certain creditors of the State of South Carolina, in preference to and with priorities over the complainants, and all others holding notes and bills of the said bank; whether "The President and Directors of the Bank of the State of South Carolina" have not suspended the exercise of all the functions of

a bank, such as were conferred by its charter, and it was used to exercise. And that the said "The President and Directors of the Bank of the State of South Carolina," may further set forth and discover of what the capital of the said bank consisted; whether the securities transferred to it by the State of South Carolina, were not sold or otherwise converted into money; and of what amount of money the said capital of the said bank was; whether any, and what, additions were made to the capital of the bank, and to what amount, and whether the whole capital of the bank, as well as that of which it originally consisted, as all subsequent additions to the same, did not become the basis upon which the issues by the bank of its bills and notes were made; whether the
15 bills and notes so issued by it, did not furnish and become a large part of the circulating medium of the State of South Carolina; whether, for the redemption of such bills and notes, and the withdrawal of such circulation, the said bank had any other resources under the control of the said bank than its capital; whether the whole amount of its notes and bills which, from time to time, were put in circulation, was not known to the legislature of the State of South Carolina.

And that the said "The President and Directors of the Bank of the State of South Carolina," may further set forth and discover the amount of the notes and bills of the said bank, which have been issued, and are now outstanding and not redeemed; of what the capital of the said bank now consists; of the value thereof in money at this time; of the nature of the distinctions, if any, between the capital of the said bank and the property and assets of the said bank; and if there be any such distinction, then the amount that is considered as the capital, and the amount that is considered of the property and assets of the said bank.

And that the said the president and directors of the said bank may set forth, in whose custody, control, power or possession, is the capital of the said bank, as also the property and assets of the said bank; and if the same are not in the custody, control, power, or possession of the said "The President and Directors of the Bank of the State of South Carolina," or its proper officers and agents, in whose custody, control, power, or possession the same now are; when so transferred, by whose order, under what authority, and if only part has been so transferred, what part thereof, and for what amount.

And that the capital of the said bank, chartered and known as "The President and Directors of the Bank of the State of South Carolina," may be held and taken as pledged for the security of your orators and all others, who, with them, may be holders of the bills and notes of the said bank, and for the payment of which, the capital of the said bank, was, by its charter, positively pledged. That the said capital may be held as thus pledged and made applicable to the redemption, so far as it will suffice, of the bills and notes of the said bank. And the said capital and all other property and assets of the said bank, so far as they constitute the capital of the said bank, may be administered under the direction, order or decree of this honorable court. That if the capital of the said bank has been in any part thereof lost or wasted, that any other property or assets of the said bank, in addition to its capital, if any such there be, may be applied to make good the portion of the capital so lost or wasted. That the said "The President and Directors of the Bank of the State of South Carolina," may set forth and discover if any portion of the capital of the said bank has been lost or wasted;
16 how the same has been lost or wasted; to what amount the capital has been so lost or wasted; in what manner, or from what cause, it has been so lost or wasted; what amount of the said capital

now remains; of what the same consists, and how it is now invested. That the said "The President and Directors of the Bank of the State of South Carolina," may set forth and discover, what property and assets of the said bank they have applied, according to the requirements of the legislature of the State of South Carolina, to the payment of the creditors of the State of South Carolina, described as the holders of the fire-loan bonds; whether the debt contracted with the parties holding the said bonds, was not the debt of the State of South Carolina, as the principal borrower, or by virtue of its special endorsement or guarantee; and whether the State of South Carolina is not now in its separate political capacity, indebted to the said bank, for loans and advances made to it; and if so, to what extent such loans and advances have been made; and whether the said bank has not, from time to time, paid and discharged large amounts of the public debt of the State; and if so, to what amount. And that an account may be taken under the order and direction of this honorable court, of the capital of the said bank, and of its property and assets, if the same are regarded by it as different and distinct from its capital. If so regarded, that such property and assets may be applied in the first place, to make good its capital for the benefit of the creditors of the said bank, for whose protection the capital thereof was pledged; and to make good any deficiency thereof, the State of South Carolina becomes bound, but which obligation cannot be enforced in this honorable court. That an account may be also taken of the bills and notes which have been issued and put in circulation by the said bank; that all and every person and persons holding the same, may be required to produce the same; and for that purpose the proper order be made by this honorable court, requiring all such persons to appear, produce and prove their claim in that behalf. That if any person or persons claiming other than as holders of the bills or notes of the said bank, to an equal or prior claim of the capital of the said bank, whether as holders of the public debt known as the fire-loan bonds, or otherwise, shall present their claim in that behalf, that they may be admitted as parties to these proceedings, by filing with one of the masters of this court, the name or names of the party or parties so claiming, and the amount so claimed by him or them. Your orators in this behalf alleging that they do not know of their own knowledge, nor have they information of the name or names of any person or persons so claiming; nor of the amount so claimed by such person or persons; wherefore they are unable to make such person or persons a party or parties to these proceedings, if the same is necessary. And that your
17 orators may have leave, if the same shall be necessary, to apply for and obtain the order of this honorable court, for the appointment of fit and proper person or persons as the receiver or receivers of the capital of the said bank, or if the same has been wasted or lost, of its property or assets to the amount of the said capital, for the purpose of holding, disposing, and administering the same, under the order, direction and decree of this honorable court, in payment of the bills and notes held by your orators; and of such other person or persons as are also holders of such bills and notes, and with your orators, entitled to be paid from the capital of the said bank.

And that the said "The President and Directors of the Bank of the State of South Carolina" may be enjoined and prohibited, by the order of this honorable court, from disposing or in any manner parting with the possession or control of the capital, property or assets of the said bank, whether the same has or not been ordered by the legislature of the State of South Carolina, except in obedience to the order, direction

or decree of this honorable court. That if any portion thereof has been disposed of as required by the legislature of the said State, that they set forth and discover what amount has been so disposed of, to whom it has been transferred, by whom so disposed, under what authority, and for what purpose. And that your orators and those claiming with them as holders of the bills and notes issued and put in circulation by "The President and Directors of the Bank of the State of South Carolina," may be decreed to have from the capital of the said bank, or from its property and assets, if the capital has been lost or wasted, or any part thereof, payment of the bills and notes so held by them, and for such relief in the premises as may be necessary therefor; and also for such other and further relief in the premises as they may be entitled to ask for and receive.

May it please your Honors to grant unto your orators not only your writ of injunction, directed to "The President and Directors of the Bank of the State of South Carolina," Charles M. Furman and Thomas R. Waring, prohibiting them, or either of them, as principal officers or agents, from parting with the capital, property, or assets of "The President and Directors of the Bank of the State of South Carolina," except under the order and decree of this honorable court; but also your writ of subpœna, directed to the said "The President and Directors of the Bank of the State of South Carolina," Charles M. Furman, president, Thomas R. Waring, cashier, commanding them and each of them, etc., etc.

MAGRATH & LOWNDES,
Complainants' Solicitors.

18 STATE OF NEW YORK, *City of New York, ss:*

Personally appeared Charles H. Dabney, one of the firm of Dabney, Morgan & Co., who, being duly sworn, says he is one of the complainants in the foregoing bill; that the said bill is true of his knowledge, so far as relates to his own act and deed, and that he believes the same to be true so far as relates to the act or deed of any other person.

C. H. DABNEY.

Sworn to before me this 9th day of October, 1867.

CHARLES C. JONES, JR.,
Commissioner of Deeds for the State of South Carolina, resident in the City, County, and State of New York.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Be it remembered that, on this, the ninth day of October, eighteen hundred and sixty-seven, before me, Charles C. Jones, jr., a commissioner of deeds for the State of South Carolina, residing in the State of New York, duly commissioned by executive authority, and empowered to take acknowledgments, administer oaths, etc., etc., to be used and recorded in said State of South Carolina, personally appeared the above named Charles H. Dabney, to me well and personally known, who, being first duly sworn, did sign and depose unto the foregoing bill in equity, and the jurat thereto attached.

In testimony whereof I have hereunto set my official signature, and attached my seal of office, the day and the year first above written.

CHARLES C. JONES, JR.,
Commissioner of Deeds for the State of South Carolina, resident in the City, County, and State of New York.

Filed October 30th, 1867.

19 THE STATE OF SOUTH CAROLINA,
Charleston District:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina. } In equity.

The answer of The President and Directors of the Bank of the State of South Carolina to a bill of complaint of Charles H. Dabney, John P. Morgan, James J. Goodwin, and George H. Morgan, trading and doing business under the name and style of Dabney, Morgan & Company.

Defendants, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the manifold errors, uncertainties, imperfections, and insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as they are advised is material for them to make answer unto, answering, say: That these defendants admit that they were incorporated, as alleged in complainants' bill, in December, 1812, by the name therein stated, and that in the main the charter is correctly set forth in complainants' bill, so far as the statement of its contents is concerned. But said charter is a public act of the general assembly of South Carolina, published by authority of the legislature, in the eighth volume of the Statutes at Large, page 24, and to said act as therein contained defendants ask leave to refer as often as necessary, and join with complainants in referring "to all other acts of the legislature, which in any manner amend or change the said act, or affect the purposes, powers, management, or direction of said bank."

20 Defendants refer for this purpose to a volume known as the "Bank Compilation," published, by authority of the legislature, in the year 1848, which contains the amendatory acts cited by complainants. And, admitting the renewal of the charter, defendants refer particularly to the act on this subject, passed in December, 1852. (12th Statutes at Large, page 149.) Defendants admit the issue of bills or notes, promising to pay the bearer in gold or silver coin the amounts in said bills or notes severally named, and that such bills or notes, for a long time, constituted a part of the circulating medium of the country, for the payment of which defendants, as a corporation, were and are now legally bound. But defendants do not believe, and therefore deny, that the bills alleged to be held by complainants came into the hands of complainants as "a part of the circulating medium of the country," or that they were "accepted" by complainants "as being," in fact, "payable in gold or silver," or that said bills were "received" by complainants "as money." On the contrary, defendants have reason to believe, and do believe, and so aver, that these bills, long after they had ceased to circulate as money, were bought up by complainants, on speculation, for a very small amount, probably not one-tenth of the amount named in said bills. And defendants further aver that, from the best information they can obtain, they believe that very few bills are now held by either individuals or corporations who received them "as money," or under any confidence, trust, or hope, that said bills would be redeemed in gold or silver coin. Defendants, nevertheless, admit their liability, at law, for genuine unpaid bills, and if in funds to pay all indebtedness, would not hesitate to pay them when presented. Complainants allege that, in addition to this obligation on the part of the bank, "the faith of the State was pledged for the support of the bank,

and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiencies; and upon this averment charge that the State is bound to redeem the whole issue of the bank, and has guaranteed its creditors against all loss whatever.

Various other allegations in complainants' bill affect the good
21 faith, the honor, and interests of the State of South Carolina, as well the people at large as the government itself, a leading purpose of the bill being, in terms, to set aside a solemn act of the legislature, intended to protect, under peculiarly adverse circumstances, such good faith, honor, and interests. Defendants submit that these matters being alleged by complainants, according to the principles of equity, and the rules of equity practice, the attorney-general of the State, as such, was a proper and necessary party to these proceedings. Although no decree can be had against the State, the State, through her attorney-general, is entitled to a hearing before the court. Defendants are informed that such is the invariable practice in English chancery courts, and the position is sustained by high American authority. (See Story's Equity Pleadings, § 69 and note 3, and § 222.) And defendants hope they shall have the same benefit of this defence as if they had demurred to complainants' bill for the want of proper parties. Defendants, however, while protesting against any obligation to answer for the State, submit that the State did not undertake absolutely to guarantee all future indebtedness of the bank, but simply to give to it the patronage and protection of the State. Defendants submit that the pledge to supply any deficiency in the funds "specifically pledged," meant no more than is thus expressed, to wit: a guarantee that the funds then pledged should avail, dollar for dollar; which pledge defendants aver has long since been redeemed. Defendants admit that the operation of the bank has enured, as they believe, to the benefit of the State, and that when the reverses growing out of the recent war came upon us, the State of South Carolina had received from defendants a full equivalent for the capital originally advanced, but defendants submit that this allegation, which defendants believe to be true, contradicts the idea of any deficiency in the funds originally pledged.

The failure of defendants to meet all their obligations has arisen, not from deficiency of funds originally specifically pledged, or from withdrawal of the support of the State, but from disasters growing out of the recent war, the failure of the confederate cause, and the destruction
of the confederate government, under which, for four years, the
22 bank had conducted its affairs. They have shared in the general ruin, from causes which have operated alike on individuals, on other corporations, and on States themselves; and they utterly deny the charge of perversion of funds, of bad faith, or mismanagement, which seems to be imputed by complainants.

Defendants, without denying their legal obligation to pay bills issued by them, cannot admit the statement made by complainants, that they, the complainants, were deceived by the promise to pay gold and silver, or by the pledge of funds advanced, for, as defendants believe, all specie payment had ceased on the part of the bank, and its capital had become notoriously impaired long before complainants came into possession of the bills which are the subject of this suit; and, as to the pretended pledge of the State, complainants, it is believed, well knew, before these bills were bought as merchandise at enormous discount, that the State, (without repudiating any indebtedness,) was utterly unable to pay the interest on her acknowledged debts, and this interest on debts undisputed, and of sacred obligation, complainants well knew to be unpaid

from sheer inability on the part of the State, in its exhausted condition, to meet its engagements.

Defendants require not only strict proof of the possession of the bills claimed by complainants, and all other creditors, but submit to the court, that in the administration of the equitable assets of the bank, or any assets of the bank, through this court, the parties claiming should be required to prove the amount paid for the bills in their possession and the date of their acquisition, and of the fact that said bills or notes, at the time when they were received by complainants, were in circulation, or were in fact "received" by them "as money," as is charged in complainants' bill.

Defendants believe that it would be anything but equity to apply the assets which they hold in trust, exclusively to billholders, who, as they believe, of all classes of creditors, have paid the least for the evidences of indebtedness held by them, and if they are to share at all, they should in equity be scaled down to the amount paid out when speculating on the condition of the bank.

23 Defendants admit that, as a bank, they have not paid out specie for their bills since 1861; when, from the force of circumstances, all the banks of this State suspended specie payments. They admit that an act was passed in December, 1865, in substance, as stated in complainants' bill, but refer for particulars to the act itself, 11th Statutes at Large, page 267. Defendants deny that this act which appropriates the assets, first, to the payment of the bonds known as the fire-loan bonds payable in Europe; second, to the fire-loan bonds payable in the United States; and, third, to outstanding bills and notes, is either unconstitutional, as impairing the obligation of contracts, or contrary to good faith, equity, or conscience. The bank had long suspended, and, from the events of the war, was not in a condition to pay at once all its creditors. No bankrupt law existed at the time of the passage of the act. The legislature represented the sole stockholder. Its power and control over the bank was, at least, equal to that of the united stockholders of a private bank. Defendants were but its servants. The legislative will was supreme. This paramount power, controlling the corporation, exercising for the corporation the ordinary privilege accorded by the then existing law, undertook to prefer certain named creditors, while the whole of the assets were appropriated to the payment of debts, nothing being reserved to the corporation or the stockholder controlling. Defendants submit that the preferences made were not only in conformity with the then existing law, and with good faith, but in accordance with the strictest equity and most enlightened conscience. Creditors whose original dealing had been with the bank, in the days of its solvency, whose faith had been proved by their works, in paying full value, according to the face of the instruments, for the evidences of indebtedness received, the holders of securities which for the most part had never changed hands, were preferred to those who had speculated on original holders, and had, at enormous discount, received the obligations of an institution believed to be insolvent. The Barings are probably the largest holders of these bonds, and have, as agents of the bank,

24 promptly met the interest as it fell due, not only during the war, but through all the financial embarrassments that have followed up to the present time. Defendants submit that the act was a statutory assignment of assets for the benefit of creditors, preferring certain creditors upon principles equitable and fair, and in accordance with the then existing law. And they aver that said assignment was executed by the highest power known to the corporation, and in a form the most solemn.

Defendants deny that the two first classes of creditors were not creditors of the bank. In form these bonds are the bonds of the State, but the bank was, before the negotiation of said bonds, pledged for their redemption, and the proceeds were intended to form, and did become, a part of its capital. The nature of the transaction, defendants aver, made the bank, virtually, the primary obligor, and the State, the guarantor. Defendants submit that an examination of the several acts, and a history of the proceedings under them, will show that said bonds were negotiated as a debt of the bank, as a corporation, guaranteed by the State; and that the obligation of the city of Charleston, like that of the individual borrowers, was intended as a security to the bank, and to the State, and not to purchasers or holders of the bonds. Upon the payment by the individual borrowers the city of Charleston was absolved, and after such payment, which, for the most part, has long since taken place, the bank and the State alone were pledged to bondholders, and now constitute the sole resources of this class of creditors. The bondholders, it is submitted, have no remedies, except against the bank, and such remedy, as under their contract, they can urge against the State, and these remedies are open to the billholders as well as ourselves.

The fire-loan bonds, defendants admit, did become incorporated with the capital of the bank, but whether such incorporation subjected it to the pledge made by the State in the original charter, twenty-six years before, to make good deficiencies, is a question of law, which defendants leave to the determination of the court, but which they deem immaterial to the issue. Defendants submit that, as a corporation, they have ever been, since the inception of the claims, bound as a party
25 to the original contract, for a consideration, to pay the fire-loan bonds. Bonds negotiated under this loan to the amount of $ have already been paid by the bank, and the residue constitute an indebtedness which, upon every principle of morals, they should most struggle to pay in full. All the coupons on said bonds were signed, it will appear, by C. M. Furman, then cashier of the bank, and now its president. (See Bank Compilation, page 667.) They deny, therefore, that the preferred debts are not debts to which they are a party and for which they are not bound, and aver, on the contrary, that these debts are such as the controlling power of the corporation had a right to prefer under the then subsisting laws of the land, and which it was just and reasonable it should prefer.

Defendants admit that, since 1812, the bank has paid to the State more than has been received by the bank from the State, but they deny that that is the true measure of indebtedness of the State to the bank. The State was the sole stockholder, and as such, legally entitled to the profits of the institution for more than half a century. Such payments could not create an indebtedness. But how, it is submitted, can such a calculation affect the right of a corporation, avowedly unable to pay on demand all its creditors, in determining its preference of creditors as to the order of payments to be made? The State has repudiated no debt. The State has denied no contract, or, in any way, impaired the obligation of a contract. It has only exercised in behalf of a corporation, in which it was the sole stockholder, the privilege, immemorially accorded to the humblest individual debtor, of determining the order in which debts shall be paid. Defendants submit that the assignment of the assets of the bank was consummated as soon as the act of the legislature was ratified in December, 1865, and could not be affected by the bankrupt act, passed by the Federal Congress, in March, 1867.

Defendants admit that, in common with all the other banks of the

South, they ceased to do the ordinary business of a bank after the surrender of the armies of the South. They admit that, since December, 1865, they have endeavored to carry out the general purposes of the act of that date referred to by complainants, except that they have,
26 on advice taken, declined to act even as a "bank of discount and deposit," and have confined themselves to acts of liquidation and services as fiscal agents of the State. For further answer they refer to the last report of the president of the bank to the legislature, in December, 1865.

The exhibit herewith filed, marked "A," will show of what the original capital of the bank was composed. In 1838, the fire-loan, amounting to $2,000,000, was added to it, but the capital has since been reduced, by payment of the fire-loan bonds as they matured, and of the three-per-cents. The capital as it now appears on the books is:

Capital	$1,073,560 13
Fire-loan, payable here	318,159 35
	$1,391,719 48
Fire-loan, payable in London	£109,000

All the capital was, of course, to some extent, the basis of issues, and the legislature was annually informed of issues made. The issue of the bank not redeemed, and which, if not lost or destroyed, is still outstanding, is of the following description and amount, to wit:

Issues, $1 and upwards	$3,070,578 58
Less in vault redeemed	478,984 00
	$2,591,594 58
Issues under $1, previous to 1860	78,293 93
Issues under $1, under act 1861	306,162 75
Issues under $1, under act, 1863	412,514 35
	$3,388,565 61

The property and assets of the bank are under the custody and control of defendants and their agents. Defendants deny all waste of property or capital but admit very heavy and disastrous losses from causes beyond their control, and submit the statement contained in Exhibit B.
27 The bonds and stocks, as therein stated, are put down at their cost, but these have largely increased by the funding of interest past due, and a payment of a stock dividend by the South Carolina Railroad Company. The entire amount of bonds and stocks held by the bank, at their par value, will appear by reference to exhibit marked C, herewith filed, and which also furnishes the real estate owned by the bank.

Defendants have before stated that they consider themselves in fact, though not in form, primarily liable for the fire-loan bonds, which for so many years have formed a part of their capital, and that the State is really, though not in form, the guarantor only. Defendants refer to the following acts: (See act June, 1838, Bank Compilation, page 40.)

Defendants are unable to state precisely the indebtedness of the State to the bank. This will depend upon an adjustment of the mutual indebtedness between the bank and the State. Large payments have been made by the bank on the debt of the State, for which refer to the report of the comptroller-general, December, 1848. Defendants again

refer to the report of the president in 1866, and, if required, are willing to account further before the master in any way ordered by the court.

Defendants are able to furnish the names of some of the holders of the preferred debts, and to suggest how, in some way they should be notified of these proceedings, but until such bondholders are made parties, defendants, as trustees for such bondholders, object to any action of the court, in the matters submitted, and hope that this defence will avail them as if presented by demurrer, on account of want of proper parties. The defendants, as in duty bound, desire to carry out the intentions of the legislature, but, in addition, they believe that the bona-fide holders of the bonds, the Barings and others, who gave full value for the bonds, have a higher equity than the speculators, who have, for a trifle, bought up bills which had long ceased to pass as money, and defendants feel specially bound to protect the interests of these bondholders, foreign and domestic.

Defendants submit that, so far as the liquidation of indebtedness is concerned, even if the court undertakes to direct the
28 same, the present managers of the bank are the most fit and proper agents for this purpose who could be selected. The president has been in that position for seventeen years, and had for eighteen years previous been cashier. The cashier has been in that office since 1850, and has been connected with the institution for twenty-nine years. Who else could understand so well the affairs of the bank and the value of its assets?

Defandants, not only for themselves, but in the name of the unrepresented creditors, as well as the State, protest against the appointment of a receiver or the removal of the assets from their present custody.

Having thus answered the allegations in complainants' bill, these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) THE PRESIDENT & DIRECTORS OF THE
(SEAL OF) BANK OF THE STATE OF SOUTH CAROLINA,
(CORPORATION.) P'r C. M. FURMAN, *Pres'd't.*

HAYNE & SON,
Defendant's Solicitors.

29 EXHIBIT A.

Bank of the State of South Carolina, for capital, in account with the State.

1813.	To 800 shares Planters' and Mechanics' Bank, sold at ..	$19,341 77	
1813.	To 498 shares State Bank, sold at	53,004 99	
1813.	To articles used in transporting materials, sold	200 00	
			$72,546 76
1813.	To cash from Charleston, treasury		30,000 00
1813.	To 873 shares State Bank, sold for	90,556 58	
1814	To articles used in transportation	220 00	
			90,776 58
1814.	To cash from Charleston treasury	35,512 35	
1814.	To cash from Charleston treasury	19,994 08	
1814.	To cash from Charleston treasury	2,285 50	
1814.	To cash from Charleston treasury	4,784 87	
			62,576 80
1814.	To cash from Charleston treasury	11,341 26	
1815.	To cash from Charleston treasury	38,091 75	
1815.	To cash from Charleston treasury	17,597 72	
1815.	To cash from Charleston treasury	15 876 30	
			82,907 03
1816.	To cash from Charleston treasury	13,030 65	

1816.	To cash from Charleston treasury	38,188 82	
1816.	To cash from Charleston treasury	31,651 12	
1816.	To cash from Charleston treasury	17,375 66	
			100,246 25
1817.	To 417 shares State Bank, sold for	45,815 00	
1817.	To 1,166 shares State transferred to cashier	116,600 00	
1817.	To profit on 156 shares since sold	3,076 80	
			165,491 80
1816.	To 46 shares State Bank, sold for		5,920 20
1816.	To cash from Charleston treasury	15,711 22	
1817.	To cash from Charleston treasury	38,931 67	
1817.	To cash from Charleston treasury	43,650 54	
1817.	To cash from Charleston treasury	14,120 23	
			112,413 66
1817.	To cash from Charleston treasury	14,772 46	
1818.	To cash from Charleston treasury	39,304 97	
1818.	To cash from Charleston treasury, balance	258,385 30	
1818.	To interest received from the United States	15,604 29	
			328,067 02
1819.	To profit on 93 shares State Bank	1,920 00	
1819.	To United States stock sold	147,871 40	
			149,791 40
1819.	To cash from Charleston treasury	29,375 57	
1819.	To cash from United States stock	10,842,61	
1819.	To cash from United States stock	127,196 28	
1819.	To cash from United States stock	4,098 64	
			171,513 10
			$1,372,250 60

30 EXHIBIT. B.

Statement of the Bank of the State of South Carolina, January 1, 1868.

DR.

To capital		$1,073,560 13
To bank-notes issued	$3,070,578 58	
To bank-notes issued under $1	78,293 93	
To bank-notes issued under $1, act 1861	306,162 75	
To bank-notes issued under $1, act 1863	412,514 35	
		3,867,549 61
To interest on notes, &c	12,220 66	
To premium account	19,375 25	
To profit and loss	135,407 31	
		167,003 22
To State treasury, sinking-fund	3,387,784 26	
To State treasury, fire-loan	802,603 79	
		4,190,388 05
To State treasury, new account		168,944 03
To State South Carolina loan, under act December, 1864	1,340,576 42	
To State South Carolina redemption 6-per-cents. 1860	39,200 00	
		1,379,776 42
To agency at Laurens	1,000 00	
To Conner & S	196 80	
		1,196 80
To Baring Brothers & Co		28,004 10
To due sundry banks		28,520 58
To drafts in transitu		25,056 03
To personal deposits		4,165,934 79
		$15,095,933 76

31 CR.

By bills and notes discounted	$1,642,561 98	
By bills and notes in suit	85,392 58	
		$1,727,954 56
By bond account	52,446 43	
By bond account, fire loan	2,327 66	
		54,774 09

By agency at Spartanburg		43,380 72
By agency at Columbia		171,411 03
By interest on 6-per-cents, fire-loan	1,947 32	
By interest and expenses	68,261 99	
		70,209 31
By State South Carolina, advances for new State-house	119,278 49	
By State South Carolina, advances for sundries	531,769 85	
By State South Carolina, advances for military conting's	997,382 25	
		1,648,430 59
By State South Carolina, for old currency surrendered		1,012,124 08
By Wilmington and Manchester Railroad Co. bonds	87,361 80	
By Greenville and Columbia Railroad Co. bonds	48,284 75	
By Laurens Railroad Co. bonds	38,500 00	
By South Carolina Railroad 5-per-cent. bonds	29,454 44	
By South Carolina Railroad 7-per-cent. bonds	100,000 00	
By South Carolina sterling bonds	103,163 80	
By Charlotte and South Carolina Railroad Co. bonds	752 50	
By Northeastern Railroad Co. stock	30,000 00	
By Savannah and Charleston Railroad stock	35,525 00	
By South Carolina Railroad stock	190,329 98	
By Commercial Bank stock	400 00	
By Confederate States 4-per-cents	11,400 00	
By Confederate States 6-per-cents	60,500 00	
By Confederate States 7-per-cents	867,000 00	
By Confederate States 8-per-cents	2,673,400 00	
By Confederate States 4-per-cent. call-loan	1,222,300 00	
By Confederate States 8-per-cent. call-loan	18,000 00	
		5,516,372 27
By treasury notes of Confederate States		2,373,921 93
By bank estate	87,744 11	
By real estate	32,182 17	
		119,926 28
By domestic exchange protested		57,877 67
By foreign exchange protested	5,977 78	
By Hambro & Son	157 82	
		6,135 60
By State treasury, old account		1,152,008 40
By due by sundry banks		644,360 24
By cash, specie	3,266 05	
By cash, United States currency	14,416 82	
By cash, bills receivable South Carolina	867 15	
By cash, bills other banks	500 00	
By cash, bills this bank	477,996 97	
		497,046 99
		$15,095,933 76

32

EXHIBIT C.

Bonds and stocks of incorporated companies and of the State, owned by the Bank of the State of South Carolina, put down at their par value.

122 bonds Wilmington and Manchester Railroad Co., $1,000 each	$122,000 00		
31 bonds Wilmington and Manchester Railroad Co., $500 each	15,500 00		
1 certificate of indebtedness Wilmington and Manchester Railroad Co	375 00		
		$7,875 00	
100 bonds Greenville and Columbia Railroad Co., each $500	50,000 00		
32 certificates of indebtedness of Greenville and Columbia Railroad Co., each $500	16,000 00		
3 certificates of indebtedness of Greenville and Columbia Railroad Co., each $100	300 00		
1 certificate of indebtedness of Greenville and Columbia Railroad Co	84 75		
		66,384 75	
77 bonds of Laurens Railroad Co., each $500		38,500 00	
14 bonds of Louisville, Cincinnati, and Charleston Railroad Co., 5 per cent., (with interest from July, 1864)		31,111 11	

228	bonds South Carolina Railroad Co., 7 per cent. $500		114,000 00
	Sterling bonds of the South Carolina Railroad Co., in hands of the Barings, as collateral security	£31,200	
1	bond held here	£600	
1	certificate of indebtedness held here	£50	
			£31,850
1	certificate of indebtedness, Charlotte and South Carolina Railroad Co		$752 50
1,799	whole shares South Carolina Railroad and South Western Railroad bank, par $125		224,875 00
1,799	half shares in road, par $50		89,950 00
600	shares stock Northeastern Railroad Co., at $50		30,000 00
350	shares stock Savannah and Charleston Railroad Company, at $100		35,000 00
6	per cent. bonds of State of South Carolina		12,500 00

REAL ESTATE.

Building corner Broad and State streets, used as banking-house.
Banking-house of Branch, at Columbia, S. C.
Banking-house of Branch, at Camden, S. C.
Banking-house of Branch, at Abbeville.
Block of buildings on East Bay and Fraser's wharf, and stores in the rear.
House and lot in Elliott street.
House and lot in Doughty street.

33 STATE OF SOUTH CAROLINA,
Charleston District:

Personally appeared Charles M. Furman, the president of The President and Directors of the Bank of the State of South Carolina, one of the defendants to the bill of complainant referred to in the foregoing answer, who, being duly sworn, says that the matters and things set forth in said answer, are true, so far as they depend on his own knowledge, and so far as they depend on information derived from others, he believes them to be true.

C. M. FURMAN,
The Pres'd't of the President & Directors of the Bank of the State of South Carolina.

Sworn to before me this 31st day of January, 1868.
JNO. D. ALEXANDER,
Notary Public.

Filed 3d day of February, 1868.

STATE OF SOUTH CAROLINA,
Charleston District:

BETWEEN DABNEY, MORGAN & Co.,
and
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina, et al. } In chancery.

Decretal orders.

Upon hearing the bill and answer in this case, and upon motion of Magrath & Lowndes, complainants' solicitors, and with consent of Hayne & Son, solicitors of The President and Directors of the Bank of the State of South Carolina, and of Baring Brothers & Co.; and of I. W. Hayne and J. B. Campbell, solicitors for Maria Simons and Jane V. Bowly, executrix of Jane V. Heyward; and Thomas Y. Simons, solicitor of Arnoldus Vanderhorst Dawson, holders of State fire-loan stock, it is ordered that the bill be amended by making the attorney-general, in

behalf of the State of South Carolina, he being now in court and consenting, a party defendant, for the purpose of sustaining the validity of the act of 1865, referred to in the pleadings; and also by making parties defendant the firm of Baring Brothers & Co., who have obtained leave to answer as such, as also Arnoldus Vanderhorst Dawson, Maria Simons, Jane V. Bowly, executrix of Jane Heyward, holders of fire-loan stock, payable within the United States, and as representing that class of creditors; and that upon the coming in of the answers of the attorney-general, in behalf of the State of South Carolina, and of Baring Brothers & Co., and of the aforesaid holders of the fire-loan stock, made parties defendant, or an order obtained that the bill be taken pro confesso against them, the case, at and after the first day of June next, be referred to Mr. Tupper, one of the masters, to inquire into and report on the matters set forth in the pleadings, and to take such evidence as the parties may offer in support of the matter charged in the bill, or denied in the answers, with leave to report special matter.

34 2. That the said master, by public advertisement in one or more leading newspapers in the cities of Charleston, Cincinnati, New Orleans, New York, and Augusta, call in any person or persons claiming to be creditors holding bills or notes of the corporation known as The President and Directors of the Bank of the State of South Carolina, to make proof of their claims on or before the first day of June next ensuing; also notifying, by said advertisement, all creditors residing in the United States, holding State stock, for which said corporation has been made liable by law, said stock being described in the pleadings as "fire-loan bonds owned in the United States," to make proof of the same within the same period.

3. In all cases of persons claiming, whether said claims consist of bonds, fire-loan stock, or bank-notes, due notice of the application to make proof shall be given to the parties to the bill and answers in these proceedings, or their solicitors. And in all such cases where parties claiming, shall hold or be possessed of any securities, given and acted as securities for the claims by him or them made, such party or parties shall, on presentation of said claims, make a statement of such securities and their probable value; and also a statement of the time when the claim or claims presented came into his, her, or their possession, and the consideration paid therefor, that the same may be considered by this court in determining the amount of such claims and the disposition of such securities.

4. It is further ordered that, upon the coming in of the answers of the attorney-general in behalf of the State of South Carolina, Baring, Brothers & Co., and of such parties in the United States, holding fire-loan stock, as shall have answered in this case, on or before the first day of June next, or upon order obtained against any of such last-mentioned parties, that the bill be taken as confessed after service of process to answer, then the said "The President and Directors of the Bank of the State of South Carolina," Charles M. Furman, president, and Thomas R. Waring, cashier of the said bank, do account before Mr. Tupper, one of the masters, for the capital, property, and assets of said corporation, in their hands or under their control, (under such regulations as the said master shall prescribe,) to the end that the case may as speedily as possible be prepared for a hearing.

5. It is further ordered that, to avoid multiplicity of suits and waste of the fund, until such hearing can be had, and a decree rendered in this case, all creditors of said corporation, whether billholders or bondholders, or claimants in any other form, are enjoined from all proceed-

ings in law and equity against said corporation, its property or assets, except as parties to these proceedings.

6. It is further ordered that, in consideration of the said injunction of the creditors of said corporation, from bringing suit against the same, the said corporation and said Charles M. Furman, and Thomas R. Waring, are hereby enjoined, until the said hearing shall be had and rendered, from paying over any portion of the assets (moneys deposited since December, 1865, alone excepted) of said corporation, except for current expenses, including counsel fees for conducting the defence of this suit, to any creditors of the same, unless by special order of the court, without prejudice, however, to the right of these parties to collect debts of the corporation, and to change the form of assets in possession.

7. It is further ordered, that the parties to these proceedings, now before the court, and those who may hereafter be made parties, have leave to apply to this court for any additional order or orders which may become necessary in the progress of the cause, the above orders not being intended to conclude or in any way prejudge the rights or equities of the parties to this suit.

(Signed) J. P. CARROLL.

Filed March 3, 1868.

35 *Answer of the attorney-general—Filed April 3d, 1868.*

STATE OF SOUTH CAROLINA,
Charleston District:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina. } In equity.

The answer of I. W. Hayne, attorney-general of the State of South Carolina, to the amended bill of complaint of Dabney, Morgan & Co.

Isaac W. Hayne, attorney-general of the State of South Carolina, impleaded in the above case, for the purpose of defending the validity of the act of 1865, referred to in complainants' bill, appears in behalf of the State, and informs the court as follows: An act entitled "An act to raise supplies for the year commencing October, 1865," ratified and approved on the 21st day of December of the same year, contains in the 11th section of said act, the following provisions, to wit:

"XI. That The President and Directors of the Bank of the State of South Carolina be, and they are hereby authorized and required to close the branches and agencies of said bank, and that the principal bank in Charleston shall cease to be a bank of issue, but shall continue to act as a bank of deposit until further action of the legislature; and the said president and directors are hereby authorized and required to collect the assets and property of the bank, and hold the same specially appropriated—first, to the payment of the principal and interest of the bonds known as the fire-loan bonds payable in Europe; second, to the payment of principal and interest of the fire-loan bonds payable in the United States; and third, to the redemption of outstanding notes hitherto issued by the said bank." Complainants by their bill, seek to set aside the above provision, upon the ground—first, that said provision is unconstitutional and void, because it impairs the obligation of the contract between the bank and the billholders, or the State and the billholders; second, that the passage of the bankrupt act has rendered said provision inoperative and void.

On behalf of the State, the attorney-general alleges that the act of 1812, chartering the bank of the State, out of which the contract relied upon by complainants has arisen, constitutes a bank of discount, issue, and deposit, which, as a corporation dealing with its customers and the public, is subject to the same obligations and endowed with the same privileges which appertain to other incorporated banks. The general obligation of the bank to redeem its bills is admitted, but the at-
36 torney-general denies that such obligation stands upon any higher or different footing than other indebtedness. The right of a debtor, whether an individual or a corporation, to assign property for the payment of debts, and in the deed of assignment to designate the order in which the creditors shall be paid, was unquestioned in South Carolina at the date of the passage of the act of 1865. The bank of the State had long since ceased, in point of fact, to pay specie for its bills, and before that time it had become clear that, as a bank, it would never again be able to resume such payment. The bank had other creditors besides the billholders, and of course, like other corporations, could assign its assets and designate the order in which creditors should be paid. It will scarcely be doubted that such assignment could be made by the unanimous vote of the stockholders of a private bank. The attorney-general on behalf of the State, claims for the legislature of South Carolina, at least equal control over the assets of the bank in which the State is the sole stockholder, with that exercised without question by the body of stockholders of a private bank, and he alleges that the act of 1865, is to all intents and purposes a statutory assignment of assets for the benefit of creditors, designating the order in which different classes of creditors shall be paid. But not only is the assignment of assets made by the act of 1865, no violation of contract, but, as the attorney-general alleges, it is in conformity with, and the proper sequence of past pledges made by the legislature for the bank, dating as far back as 1838.

The terrible calamity of the fire in Charleston in April, 1838, was such as to induce Governor Butler to call a special session of the legislature, at which session was enacted the "Act for rebuilding the city of Charleston." By this act, ratified June, 1838, the governor was authorized and directed to effect a loan, for which purpose bonds or other contracts were to be issued to an amount not exceeding two millions of dollars and "that the faith and funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payment of said bonds or contracts with the interest thereon." At that time, the funds of the bank were the funds of the State. Sec. 10, of said act is as follows: "X. It shall be the duty of The President and Directors of the Bank of the State of South Carolina, to make provisions for the punctual payment of the interest of such loan as may be effected upon the credit of the State, under the provisions of this act, and also for the ultimate payment of the principal thereof." And sections XI and XII, make the following pledges: "XI. It shall be the duty of The President and Directors of the Bank of the State of South Carolina, to cause to be opened in the books of said bank, an account in which they shall debit themselves with the profits arising out of the additional capital, created out
37 of the two millions loan aforesaid, for the year ending on the first day of October, in the year of our Lord 1839, and with all future profits of the said loan, as the same shall be hereafter annually declared; which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof; and it shall be the duty of The

President and Directors of the said Bank, annually to report to both branches of the legislature the exact state of that fund.

"XII. When the profits of the said bank of the State of South Carolina, shall have paid the interest of certain stocks, and redeemed the said stocks, for which they have heretofore been set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof."

The act of 1865 is therefore a confirmation, only so far as the difference between the billholders and bondholders is concerned, of the act of 1838. Of these pledges made in 1838, no holder of a bill issued since the ratification of that act, can with any shadow of justice complain; for such bills were thrown into circulation, subject to these pledges, and the act of 1838, being a public act, was notice to the world. The pledges made in 1838, so far at least as subsequent issues of the bank were concerned, became superior and paramount to all equities under the supposed pledges of the act of 1812.

But the attorney-general alleges, on the part of the State, that the pledges of the act of 1812, to billholders, have been complied with. The State until the issues of the bank ceased, had always in good faith given her patronage and support to this bank—the bank in which she was the sole stockholder. And she never had occasion to make good "losses and deficiencies" in stock or securities, "specifically pledged," by the State as the capital of the bank.

If there be any obligation on the part of the State to redeem the bills of the bank, the attorney-general alleges that it is in the nature of an imperfect obligation, and not such as could be enforced against a private person or corporation at law. This discussion, however, it is submitted, is not involved in the present issue.

The attorney-general denies, therefore, that the act of 1865, impairs the obligation of any contract, or is on that account unconstitutional.

As to the bankrupt act, it did not become law until 2d March, 1867, near two years after the act of the legislature, which complainants ask should be set aside, was passed. The act of 1865, it is alleged, was, in itself, a complete assignment of assets, and being anterior to the bankrupt act, could not be affected thereby.

38 In conclusion, the attorney-general alleges, that not only has there been no violation of the Constitution, or contravention of law, but the State has pursued the course most consistent with honor and good faith, and most in accordance with equity and enlightened conscience, and to establish this, he confidently appeals to the pleadings and evidence in the cause. And the attorney-general, having answered on the only subject on which he is called to answer, to wit, the validity of the act of 1865, asks to be dismissed with his costs.

I. W. HAYNE,
Attorney-General of South Carolina.

Filed April 3d, 1868.

Answer of Maria Simons et al.—Filed April, 1868.

THE STATE OF SOUTH CAROLINA,
Charleston District:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina, and others. } In equity.

The joint and several answers of Maria Simons and Jane Vanderhorst

Bowley, executrix of Jane Vanderhorst Heyward, with whom is joined E. Bowley, husband of the said Jane V. Bowley, impleaded in the case of Charles H. Dabney, John P. Morgan, James J. Goodwin, and George H. Morgan, trading and doing business under the name and style of "Dabney, Morgan & Co," against "The President and Directors of the Bank of the State of South Carolina," and others.

The said Maria Simons, in her own right, and Jane Vanderhorst Bowley, executrix of Jane Vanderhorst Heyward, with whom is joined E. Bowley, husband of the said Jane V. Bowley, executrix, impleaded in the said case of Dabney, Morgan & Co. vs. The President and Directors of the Bank of the State of South Carolina, and others, reserving to themselves all right of exception to the said bill of complaint, for answer thereto, say: That Mrs. Jane V. Heyward, formerly of Charleston, South Carolina, died, on or about the day of , in the State of New York, leaving a will, constituting her daughter, Jane V. Bowley, wife of E. Bowley, executrix; that, among the assets of said estate were four certificates of stock, numbered 215, 221, 264, and 322, amounting in all to $34,533.34; the dates of the first two of the said certificates constituting the bulk of the amount, are October and November, 1846;
39 the third is dated January, 1848, and the fourth, October, 1850.

These certificates express on their face, that the stock was issued to secure the "fire loan," under the "Act for rebuilding the city of Charlestown," ratified the 1st June, 1838. The larger portion of said stock came to defendants through Dr. Benjamin Simons, father of Mrs. Jane V. Heyward, and was taken in the division of the estate of Dr. Simons at par. So much as was purchased by Mrs. Jane V. Heyward, was likewise bought at par. Defendant, Maria Simons, says that she was sister of the said Mrs. Jane V. Heyward, and daughter of Dr. Benjamin Simons; that she owns seven certificates of the above-described stock, to wit, numbers 216, 222, 231, 262, 318, 321, and 328, amounting in all to $41,790.72. The first two certificates were derived from the estate of her father, and were taken at par, and the rest were investments of her own, for which she has paid full value, the last certificate being dated 16th February, 1850. Defendants admit that said stock is stock of the State of South Carolina, and its assets are not on that account the less bound under the terms of the act of the 1st June, 1838. By the said act, as defendants are advised, the bank became bound as a corporation for the punctual payment of the interest on, and ultimate redemption of, the stock, and was in effect, by the act of 1838, made a trustee for the holders of stock in regard to assets in its possession.

Defendants admit that they are advised that the bank was chartered in 1812; that certain stocks were turned over by the State to form a portion of the capital of the bank; that further provision was made for the increase of said capital; that all profits were to come to the benefit of the State; and further that the faith of the State was pledged "for the support of the said bank, and to supply any deficiency in the fund specifically pledged, and to make good all losses arising from such deficiency," and that the bank was authorized to issue, and did issue, notes on the faith thereof. But defendants submit that the State has, as they are advised, in various ways given its patronage and support to the bank, and continued so to do as long as the said institution continued to be a bank of issue; that the funds at that time "specifically pledged" as part of the capital of the bank, never did fall short of the value at which they were received by the bank, and that no loss or deficiency in this regard ever took place. They submit that the pledge made in 1812 has already been redeemed.

Defendants submit that, by section 16 of said act of 1812, the legislature declared "that bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State, either at Charleston or Columbia, and by all tax-collectors, and other public officers, in all payments for taxes and other moneys due to the State."

40 But the court of errors in South Carolina, as defendants are advised, have, by the light of previous, contemporaneous, and subsequent legislation, declared that this pledge did not apply to the reception, in payment of taxes of the bills of the bank, unless said bills were, at the time of the tender, "payable on demand in gold or silver coin," and that the bills of the suspended bank were not, by force of this clause receivable at the treasury.

But defendants submit that, whatever the liability of the State for bank-bills, now, for the most part, in the hands of speculators, it cannot affect the holders of "fire-loan stock." The pledges made in regard to this stock, date back to first June, 1838. The "fire-loan act" of that date is a public act, and gave notice to the world of the pledges made. All bank bills or notes issued since that time, and it is believed that none others exist, were taken subject to such notice. Defendants specially refer to the 10th, 11th, and 12th sections of the act of 1838, and claim that, by these sections—first, the bank was made directly responsible for the fire-loan debt; 2d, the bank was made a trustee of the fund thus raised, and the duty imposed to hold the fund, and annual accumulations thereof, "solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof;" 3d, that all the profits, whether from this source or otherwise, (after the redemption of certain stocks,) were solemnly pledged and set apart for the same purpose. Defendants, therefore, claim that the postponement of billholders to the holders of fire-loan bonds and stock, in the distribution of assets, made by the 11th section, the tax-act of 1865, is not only no violation of contract, but that it was in conformity with, and the proper sequence to, the legislation of 1838.

Defendants are advised that a present sale of the assets of the bank would be disastrous to all concerned, and, therefore, object to such order. They are satisfied with the management of the old officers of the bank, and object to the appointment of a receiver. Defendants say that they do not hold or possess any securities given or accepted by them as securities for the claims herein made.

And having fully answered, and so forth, these defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) MARIA SIMONS.
JANE V. BOWLEY, *Ex'x*.
EDMUND BOWLEY.
HAYNE & SON,
Defendants Solicitors.

Filed.

THE STATE OF NEW YORK,
City and County of New York:

Personally appeared before me, Sylvester Lay, a commissioner of deeds for the State of South Carolina, in the State of New York, Maria Simons, named in the foregoing answer, who, being first duly sworn, says that the matters and things set forth in said answer as of her own

knowledge, are true, and those derived from the information of others, she believes to be true.

(Signed) MARIA SIMONS.

Sworn to before me this 11th day of April, A. D. 1868.

In witness whereof I have hereunto set my hand and affixed my official seal.

[SEAL.] (Signed) SYLVESTER LAY,
South Carolina Commissioner, 251 *Broadwry, N. Y.*

THE STATE OF NEW YORK,
City and County of New York:

Personally appeared before me Sylvester Lay, a commissioner of deeds for the State of South Carolina, in the State of New York, Jane V. Bowley, executrix, &c., and Edmund Bowley, her husband, named in the foregoing answer, who, being first duly sworn, say, respectively, that the matters and things set forth in said answer as of their own knowledge are true; and those derived from the information of others they believe to be true.

(Signed) JANE V. BOWLEY,
Executrix of Estate of Jane V. Heyward.

(Signed) EDMUND BOWLEY.

Sworn to before me this 11th day of April, A. D. 1868.

In witness whereof I have hereunto set my hand and affixed my official seal.

[SEAL.] (Signed) SYLVESTER LAY,
South Carolina Commissioner, 251 *Broadway, N. Y.*

Filed April 16th, 1868.

41 *Separate answer of A. V. Dawson.—Filed May, 20th* 1868.

(Same as answer of Maria Simons & Jane V. Bowley.)

SIMONS & SIEGLING,
Defendants' Att'ys.

THE STATE OF SOUTH CAROLINA:

The State of South Carolina to Freeman H. Morse, esq., United States consul at London, England, and Joshua Nunn, esq., or either of you, greeting:

Whereas Thomas Baring, Kirkman Daniel Hodgson, Russell Sturgis, James Stewart Hodgson, Edward Charles Baring, Henry Bingham Mildmay, William Moir, Charles Loyd Norman, James Price, and Thomas Charles Baring, doing business as merchants and bankers in the city of London and kingdom of Great Britain under the name and style of "Baring Brothers & Co.," are parties to a cause impending in the court of equity for the district of Charleston and State of South Carolina, in which Charles H. Dabney, John P. Morgan, James J. Goodwin, and George H. Morgan, trading and doing business under the name and style of "Dabney, Morgan & Co.," are complainants, and the said Baring Brothers & Co. and others, defendants; and whereas the said members of the firm of Baring Brothers & Co., reside without the limits of this State and of the United States, and for divers good causes cannot, without great inconvenience, come into the same and

answer the bill of complaint filed against them by the said Dabney, Morgan & Co. in the cause aforesaid: Therefore considering the state of the said defendants in this behalf, you, the said Freeman H. Morse, esq., United States consul aforesaid, and the said Joshua Nunn, or either of you, are hereby commanded, and full power and authority are hereby given and granted unto you, or either of you, to go to the said defendants, or any one of them, and take such answer under oath as they, or any one of them, shall make before you, or either of you, in the premises. And such answer so taken, to certify under your hands and seals, or the hands and seals of either of you who shall take the same, to the honorable the chancellor of the State of South Carolina, within the space of thirty days after the same shall be by you, or either of you, so taken as aforesaid, according to the laws and usages of the said State of South Carolina. And have you then and there this writ.

Witness James L. Gantt, esq., register in equity for the district of Charleston and State of South Carolina, at Charleston, the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and in the ninety-second year of the Sovereignty and Independence of the United States of America.

[SEAL.] JA'S L. GANTT, *R. E. C. D.*

42 THE STATE OF SOUTH CAROLINA,
Charleston District:

DABNEY MORGAN & CO.
vs.
THE PRESIDENT & DIRECTORS OF THE BANK of the State of South Carolina. } In chancery.

The answer of Thomas Baring, Kirkman Daniel Hodgson, Russell Sturgis, James Stewart Hodgson, Edward Charles Baring, Henry Bingham Mildmay, William Moir, Charles Loyd Norman, James Price, and Thomas Charles Baring, doing business, as merchants and bankers, in the city of London, in the kingdom of Great Britain, under the name and style of "Baring Brothers & Company," defendants to the amended bill of complaint of Charles H. Dabney, John P. Morgan, James J. Goodwin, and George H. Morgan, trading and doing business under the name and style of "Dabney, Morgan & Company."

These defendants reserving to themselves all right of exception to the said bill of complaint, for answer thereto, say that the house of Baring Brothers & Company, now consisting of the above-named defendants, is a long-established banking-house, and as such, the said house, in the year 1838, was applied to, in London, by the Hon. George McDuffie, to aid in negotiating certain bonds of the State of South Carolina, guaranteed by "The President and Directors of the Bank of the State of
43 South Carolina," issued under the following circumstances: In the month of April, of the year 1838, the larger part of the business portion of the city of Charleston was destroyed by fire; trade was prostrate and thousands of the inhabitants were without shelter. Such was the extent of the calamity that the general assembly of South Carolina had been called together by the governor, and had duly created and ratified, on the first day of June, 1838, an act, entitled "An act for rebuilding the city of Charleston." This act authorized the issue of the bonds referred to for the sum of two millions of dollars, thereafter known as the "fire-loan bonds," and hereinafter more particularly described. The funds thereby to be raised were by the scheme of the act to be

placed in charge of The President and Directors of the Bank of the State of South Carolina, to be loaned by them for the purpose of rebuilding the city of Charleston. The act also provided for the appointment by the said "The President and Directors of the Bank of the State of South Carolina" of an agent to be "commissioned by the governor to proceed to Europe to negotiate said loan." Under this provision Mr. McDuffie, a distinguished and favorite citizen of the State, lately governor, and for many previous years a leading representative of South Carolina in the American Congress, was appointed and accredited.

The said act of assembly, besides pledging the public faith of the State, its resources and revenue, for payment of the interest and final redemption of said loan, solemnly set aside and dedicated to that purpose the fund itself, in whatsoever form it might be thereafter invested, and all the profits thereof; and also pledging, after payment and final redemption of certain other State stocks, which defendants understand have been redeemed, the annual income or profits of one million one hundred and fifty-six thousand dollars, the then capital of the bank, owned by the State, all which will fully appear by reference to the said act of the general assembly of South Carolina, and to the printed and published statements of Mr. McDuffie, while urging upon these defendants, Baring Brothers & Company, to take said loan; and they say that in fact they did take said loan to the amount of £217,000 sterling, influenced by the provisions of said act and the representations of Mr. McDuffie.

And these defendants insist that from the time that said "fire-loan bonds" were negotiated and passed to the hands of holders who
44 had in good faith paid their money for them, and as soon as the said "The President and Directors of the Bank of the State of South Carolina" received the money thereby raised, they the said "The President and Directors of the Bank of the State of South Carolina" became, and have so continued, trustees for these defendants and other holders of the "fire-loan bonds," and as such bound to hold each and all the said funds, or the investments thereof, and the profits therefrom, in trust for the payment of the interest and the final redemption of said bonds; and also all the profits of said bank from all other sources in trust, after payment and redemption of the stocks above referred to, for the same purposes, in preference to and before all other purposes and trusts.

These bonds, known as "fire-loan bonds," were of the form following, signed by the governor of the State, to wit:

"UNITED STATES OF AMERICA,
State of South Carolina:

"£1,000 or "£500 No.	Stg.	"*Loan under an act for rebuilding the* "*City of Charleston.* "*Five per-cent. stock.*	£1,000 or £500	Stg.

"By his excellency, Pierce M. Butler, governor and commander-in-chief in and over the said State:

"Be it known that there is due from the State of South Carolina to The President and Directors of the Bank of the State of South Carolina one thousand pounds (or five hundred pounds) sterling, lawful money of Great Britain, which sum of money the said State promises to pay the said Presi-

dent and Directors of the Bank of the State of South Carolina, or their assigns in London, on the surrender of this certificate, on the first day of July, in the year or our Lord one thousand eight hundred and sixty-eight, (or one thousand eight hundred and fifty-eight,) with interest thereon at the rate of five per cent. per annum, payable semi-annually, from the date hereof, as it becomes due, on presenting the several warrants hereunto annexed at the banking-house of Baring Brothers & Company, in London.

(Signed) "PIERCE M. BUTLER, *Governor.*

"Countersigned by—
[SEAL.] "W'M EDW. HAYNE,
Comptroller-General.

45 To the bonds were attached the following coupons, signed by the cashier of the bank, to wit:

"SOUTH CAROLINA STATE STOCK.

"Under an act ratified June 1st, 1838.

"BARING BROTHERS & CO., *London:*

"Pay to bearer, on 1st July, 1839, twenty-five pounds (or twelve pounds ten shillings) sterling, being a half-year's interest on bond No. for £1,000 (or £500) sterling.

(Signed) "C. M. FURMAN,
"*Cashier of Bank of State of South Carolina.*

"£25 or £12 10/ Sterling."

On the bonds was the following indorsement, signed by the president of the bank, to wit:

"In pursuance of, and by authority of, an act of the legislature of the State of South Carolina, ratified on the first day of June, one thousand eight hundred and thirty-eight, The President and Directors of the Bank of the State of South Carolina, with a capital of three millions one hundred and fifty thousand dollars, (including the present loan,) for value received, assign and transfer the within bonds to , or bearer, and hereby guarantee the punctual payment of the principal and interest of the said bond as it becomes due, at the place specified within.

(Signed) "C. J. COLCOCK,
"*President of the Bank of the State of South Carolina.*

Mr. McDuffie exhibited in England double credentials, the first executed by the governor of South Carolina, constituting him agent of the State, and the second by the president of the bank, constituting him agent of the bank. In Mr. McDuffie's address to the public he makes the following statement:

"The legislature, in order to make assurance doubly sure, has provided that, in addition to the general pledge of the faith and resources of the State, particular funds shall be specifically appropriated and solemnly pledged and set apart to secure the punctual payment of the interest and principal of this loan. As this fund will partly consist of the profits which shall accrue from the two millions now to be borrowed,

46 the mode in which it is to be used will be stated. It is to be deposited in the Bank of the State of South Carolina as so much capital to be employed by that bank, acting as the fiscal agent of that State, in accomplishing the object of the loan.

In the same address he publishes two sections of the act of 1838, which were as follows:

"SECTION XI. It shall be the duty of The President and Directors of the Bank of the State of South Carolina to cause to be opened in the books of the said bank, an account, in which they shall debit themselves with the profits arising out of the additional capital created out of the two millions loan aforesaid, for the year ending on the first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and with all the future profits of the said loan, as the same shall be hereafter annually declared, which said fund, with all its accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof, and it shall be the duty of the president and directors of the said bank annually to report to both branches of the legislature the exact state of that fund.

"SECTION XII. When the profits of the said Bank of the State of South Carolina shall have paid interest of certain stocks, and redeemed the said stock, for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan, and final redemption thereof."

Upon the faith of these representations and assurances, the house of Baring Brothers & Co. themselves became purchasers of these bonds to a large amount, and were active in inducing others to become purchasers. They believed that the bondholders became creditors of the bank (whose capital they furnished) as well as of the State. They relied on both. They relied on the honor and good faith of a State which had hitherto always proved true to its engagement, but were well pleased that the bank, a monied institution whose life was credit, and a corporation amenable to the loss of the country was interposed between the State and the creditors. The bank besides being the debtor was agent for the State, and trustee for the creditors.

The bonds to the amount of £232,500 sterling were negotiated at the rate of about 93 per cent. Of these Mr. McDuffie negotiated £15,500 sterling, the residue to the amount of £217,000 sterling were
47 negotiated by these defendants. Many of these bonds have long since passed from the hands of Baring Brothers & Co., but this house as agents in London of the Bank in South Carolina has continued to pay the interest on said bonds down to January, 1868, and did not cease to do so even during the war in the United States, and the blockade of the Southern ports. The means for the payment of interest were furnished by the Bank of the State of South Carolina until the 1st day of July, 1863, when communication was cut off. At that time the house of Baring Brothers & Co. held as collateral security for advances made or to be made for the bank the following securities, to wit:

£26,000. Bonds of the Louisville, Cincinnati, and Charleston Railroad Company, which bonds have since matured, and with the accrued interest thereon amounting to £5,200, have been surrendered in exchange for £31,200 new bonds of same company guaranteed by the State, which latter they still hold, and which at present market-rates, are worth about forty-two per cent. This sum, which is all that defendants can control, of the funds of either the bank or the State, is utterly insufficient to pay the outstanding bonds which amount to £109,000 sterling.

"Fire-loan bonds" have been bought up from time to time under the direction and for the benefit of the Bank of the State of South Carolina by money furnished by said bank, and in 1858, when half of the original issue fell due, bonds were paid and extinguished with money furnished for that purpose by the bank aforesaid, the whole amounting to £123,500, leaving still outstanding the £109,000 sterling above referred to.

These defendants have ever considered the Bank of the State as responsible to the holders of the bonds represented by them and payable at their banking-house, and that these bondholders had, under the circumstances, a special claim as creditors of the bank as a corporation, and upon the assets of the same, as well as on the State itself. The 10th section of the act for rebuilding the city of Charleston is conclusive on this point. It reads as follows: "It shall be the duty of The President and Directors of the Bank of the State of South Carolina, to make proper provision for the punctual payment of the interest of such loan as may be effected upon the credit of the State under the provisions of this act; and also for the ultimate payment of the principal thereof."

48 These defendants, while they admit that the bonds they represent impose an imperative obligation for ultimate redemption on the State, which, (incurred in 1838,) it is presumed, can never be repudiated under any political change, submit that this, in no degree, impairs the right to claim the funds specifically pledged. And if it was apparent in 1865 that, from the force of circumstances, the State would be unable to meet its obligations at the maturity of the bonds in July, 1868, this was in itself good ground for legislative interference to confirm the appropriation of funds as originally pledged. The State was already in default in not providing for the interest on the bonds, and, as defendants are advised, could not, and cannot now provide for payment of the principal when the bonds fall due. Apart from past pledges, the State, as a sole stockholder in the bank, was authorized to give the preference made by the act of 1865, and, as the direct obligor on the face of the bonds, and unable to pay at maturity, was bound to adopt evey measure possible to secure funds already pledged, and to make every provision practicable for keeping up the credit of these securities and insuring their ultimate redemption. It is a work which no succeeding legislature could desire to undo. With a recognition by the courts of the appropriation of the assets of the bank, made by the act of 1865, and the confirmation of the act by a new legislature, defendants do not doubt that the bonds could be renewed, and the credit of the State saved in Europe.

Defendants deny that the act of 1865, which appropriates the assets of the bank—first, to the payment of the fire-loan bonds, payable in Europe; second, to the payment of the fire-loan bonds, payable in the United States; and third to outstanding bills and notes, is either unconstitutional, as impairing the obligation of contracts, or contrary to good faith, equity, or conscience.

The bank had long suspended, and, from the events of the war, was not in a condition to pay at once all its creditors. No bankrupt law existed at the time of the passage of the act. The legislature represented the sole stockholder. Its power and control over the bank was, at least, equal to that of the united stockholders of a private bank. The bank was but its servant. The legislative will was supreme. This paramount power, exercising for the corporation the ordinary privileges

49 accorded, as defendants are advised, by the then existing law,

undertook to prefer certain named creditors, while the whole of the assets were appropriated to the payment of debts, nothing being reserved to the corporation or stockholder controlling. Defendants submit that the preferences made were not only in conformity with the then existing law and with good faith, but in accordance with the strictest equity and most enlightened conscience.

Defendants aver that the act was a statutory assignment of assets for the benefit of creditors, and that said assignment was executed by the highest power known to the corporation and in form the most solemn.

These defendants further deny that said act of the legislature is void, as being contrary to the bankrupt act passed by Congress, inasmuch as they are advised that the said act of Congress is prospective in its operation, and did not become a law until the 2nd of March, 1867, near two years after the statutory assignment perfected in December, 1865.

Defendants do not believe, and therefore deny, that the bills alleged to be held by complainants came into the hands of complainants "as a part of the circulating medium of the country," or that they were "accepted" by complainants "as being," in fact, "payable in gold or silver," or that said bills were "received" by complainants "as money." On the contrary, defendants are informed that these bills, long after they had ceased to circulate as money, were bought up by complainants, on speculation, for a very small amount; probably not one-fourth of the amount named in said bills. And defendants, from the best information they can obtain, believe that very few bills are now held by either individuals or corporations who received them "as money," or under any confidence, trust, or hope that said bills would be redeemed in gold or silver coin. Defendants deny, therefore, the equity thus set up for the bill-holders in complainant's bill. Even if the bills had been received in the course of trade "as money," it seems to be doubtful whether anything which can be termed a perfect obligation to provide for them rests on the State, while the obligation towards the bondholders is explicit and indisputable. There can be no doubt, under all the circumstances, which class of creditors, if both classes cannot at once be paid, has the first claim on the legislature. But it is further submitted that the
50 bills or notes of the bank now outstanding were probably all issued subsequent to the act for rebuilding of the city of Charleston, passed in June, 1838. And this being a public act, all those who originally received these bills took them with notice of and subject to the pledges and trust created by said act, and said bills have, in every stage of circulation, continued subject to the same equities.

In confirmation of the views above set forth, defendants ask leave to refer to a letter dated October 6, 1843, addressed to them by the Hon. F. H. Elmore, then president of the Bank of the State of South Carolina, in which, among other things, he says: "You (these defendants) are the purchasers of a large portion of the 'fire-loan bonds' issued for rebuilding the city of Charleston, under the act of assembly of June, 1838. Under that act the faith and funds of the State (which includes the bank) are pledged to secure the punctual payment of the bonds; the bank was directed to make proper provision for the punctual payment of the interest, and also for the punctual payment of the principal thereof;" "and finally it was enacted" that "when the profits of the said Bank of the State of South Carolina shall have paid the interest of certain stocks, and redeemed the said stock for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on

the said loan and the final redemption thereof. Since the passage of this and the negotiation of the loan with your house, this bank has punctually discharged from its profits all interest chargeable on the stocks above referred to, and also paid d'l's 1,000,000 of the principal, which has been duly cancelled, and has now a surplus from said profits in a sinking fund, ready to pay off the remaining stocks as they fall due."

Defendants submit that they are advised that an immediate sale of the assets of the bank would be disastrous to the interests of all concerned, and therefore object to any forced sale at this time. In the meantime they are content that the old officers of the bank should hold the assets and collect the debts as directed by the act of 1865, and earnestly protest against the appointment of a receiver, or the turning over the funds of the bank into the hands of the court.

These defendants submit that the bank having received full value in sterling exchange or gold for the "fire-loan bonds" negociated by the house of Baring Brothers & Co., it would be inequitable and
51 unjust in the appropriation and distribution of the assets of the bank to graduate the amount paid to the holders according to the sums paid by the present holders of said bonds respectively. These bonds were at no time "money" or "circulating medium," but, as "public securities" used for investment, their value has, to some extent, fluctuated in the market. The bank, however, which received an equivalent for them thirty years ago, has received no detriment by these fluctuations. These defendants further submit that any difference made in the distribution of the assets of the bank on account of such fluctuation would be in contravention of the intent of the act of 1865, which directs that "the 'fire-loan bonds' held in Europe" shall be first paid, and, of course, according to the legal obligation of said bonds. Bonds of this description remaining unpaid amount, as already stated, to £109,000, which were in existence on the 1st day of January, 1868, when the interest was paid by these defendants at their banking-house, as provided by the bonds. A complete list of the present holders cannot now be furnished, but as the principal of said bonds falls due on the first day of July next, (1868,) and the last coupon attached falls due on the same day, it is to be presumed that all of said bonds will about that time be presented at the banking-house of these defendants, where they are made payable.

The defendants append to this answer, by way of "exhibit," a statement of their account with "The President and Directors of the Bank of the State of South Carolina," from the beginning of their transactions up to date. And having fully answered, and so forth, these defendants humbly pray to be hence dismissed, with their reasonable costs and charges, in this behalf most wrongfully sustained.

(Signed by) BARING BROTHERS & COMPANY.

THE KINGDOM OF GREAT BRITAIN, *England, London:*

Personally appeared before me, Freeman H. Morse, consul of the United States of America at London, duly empowered by a dedimus potestatem hereto annexed, issuing out of the court of chancery of the State of South Carolina, Russell Sturgis, esq., a partner in the firm of Baring Brothers & Company, and one of the defendants above named, who, being duly sworn, says that the matters and things in the foregoing answer contained, so far as they depend on his own knowledge, are true; and, so far as they depend on information and belief, he believes them to be true.

Sworn to before me, in the consulate, U. S. A., London, this 7th day of May, A. D. 1868.

[SEAL.] (Signed) F. H. MORSE,
Consul U. S. A., London.

Witness:

(Signed) JOSHUA NUNN, *Deputy Consul, U. S. A., London.*

HAYNE & SON,
Defendants' Att'ys.
JAMES B. CAMPBELL,
Of Counsel.

Filed May 20th, 1868.

52 CHARLESTON COUNTY, *S. C.*

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE Bank of the State of South Carolina, Baring Brothers & Co., et al.

Report of James W. Gray, special referee.

To the honorable the judge of the circuit court:

The bill in this case was filed by Messrs. Magrath & Lowndes, solicitors for Dabney, Morgan & Co., on the 30th day of October, 1867.

It sets forth, in substance, the charter of the bank of the State of South Carolina, adopted by the legislature of South Carolina in 1812, states the election, by the legislature, of the president and directors, the acceptance by them of the charter, the supply of the capital by the State, and the fact of the issuance from time to time of notes or bills of the bank redeemable in specie. It charges that the bank is insolvent, and claims in the alternative—first, that the capital and all assets and property of the bank are, primarily, liable to the holders of the bills issued, and that these billholders are entitled to payment in full before the claims of other creditors can be considered; or, failing in this, secondly, that billholders are entitled to share the assets or property of the bank, pari passu, with other creditors. It refers to the act of 1838 for rebuilding the city of Charleston, and recites the 10th, 11th and 12th sections of said act.

The bill of complaint alleges that the two millions of dollars added to the capital of the bank by the loan effected under said act of 1838
53 are subject to the same conditions with the original capital. It denies that the holders of the fire-loan bonds and stock are properly "creditors" of the bank at all, under the act of 1838, or, if creditors, that they are entitled to any preference over other creditors, and least of all to any preference over billholders.

The bill charges that the 11th section of the act of 1865, directing that the assets of bank should be held "especially appropriated—first, to the principal and interest of the bonds known as the fire-loan bonds payable in Europe; second, to the payment of the principal and interest of the fire-loan bonds payable in the United States; and, third, to the redemption of the outstanding notes hitherto issued by said bank" is unconstitutional and void—first, as impairing the obligation of the contract raised by the charter of 1812; second, as violating the bankrupt act passed by Congress in 1866.

The bill prays that "the president and directors of the bank as a corporation, and Charles M. Furman and Thomas R. Waring as individuals, answer the premises, and that they account for the capital, assets, and property in their possession.

It prays further that the court take possession of the said capital, assets, and property, and distribute the same among the creditors, claiming priority for billholders.

The President and Directors of the Bank of the State of South Carolina by their solicitors, Hayne & Son, on the 3d day of February, 1868, filed their answer to the above. They answer, admitting the charter of 1812, its acceptance, the receipt of their original capital from the State, and the issuance from time to time of bills or notes made payable in gold or silver coin, and that the holders of bills are creditors. They deny that they are preferred creditors. They deny that the present holders received these notes "as money" or "in the expectation or hope that they would be paid in coin." They allege that these notes were bought on speculation, after the insolvency of the bank, and with the full knowledge of this insolvency. The answer alleges that the bank, (being insolvent, and the assets being insufficient to pay all indebtedness,) when said assets are to be distributed by the court of equity, the
54 billholders, as creditors, can rightly claim only in proportion to the amount actually paid for the bills. The answer further alleges that the said billholders, as well as other general creditors, are, however, postponed to the two first named classes of creditors, to whom preference was given by the act of 1865. It claims that a lien was created by the act of 1838 in favor of these classes, but that even if the "pledges" contained in the act of 1838 do not constitute a "lien," giving them a priority, to the exclusion of other creditors, that act certainly constitutes these classes, to wit: the fire-loan bondholders in Europe, and the fire-loan stockholders in America, "creditors" of the bank. The answer refers to the endorsement on the bonds by the president of the bank, guaranteeing, in the name of the bank, the payment of principal and interest, in proof that these preferred classes were creditors, and creditors having peculiarly strong claims both on the state and the bank. The bondholders and stockholders being bona-fide creditors, the answer alleges that the bank was, under the then existing laws, authorized at its discretion, to assign its effects for the benefit of creditors giving a preference to these creditors over others.

It alleges that the act of 1865, adopted by the bank, or accepted by the preferred creditors, was a statutory assignment.

It alleges that such preferences impair no contract, and being consummated before the passage of the bankrupt act, could not be affected thereby.

The answer claims that the president and directors of the bank should be allowed to go on with the execution of the statutory assignment.

The answer further suggests that the State should be made a party, through the attorney-general, and that the preferred creditors should likewise be brought in to defend their interests. C. M. Furman and Tho's R. Waring, by Hayne & Son, solicitors, filed their respective answers on the 3d day of February, 1868, denying any interest except as president and cashier of the bank, and adopting as their own the answer of the bank.

On the 25th day of February, 1868, a petition was filed by Hayne & Son, solicitors, in behalf of Baring Brothers & Co., of London,
55 England, praying that they should be let in as parties defendants,

and it was so ordered. On the 3d day of March, 1868, at the February term of the court of equity, the following decretal orders were entered in the cause:

"Upon hearing the bill and answer in this case, and on motion of Magrath & Lowndes, complainants' solicitors, and with the consent of Hayne & Son, solicitors of The President and Directors of the Bank of the State of South Carolina, and of Baring Brothers & Co., and of I. W. Hayne and James B. Campbell, solicitors for Maria Simons and Jane V. Bowley, executrix of Jane V. Heyward, and Thomas Y. Simons, solicitor of Arnoldus Vanderhorst Dawson, holders of fire-loan stock, it is ordered that the bill be amended by making the attorney-general, in behalf of the State of South Carolina, he being now in court and consenting, a party defendant, for the purpose of sustaining the validity of the act of 1866, referred to in the pleadings; and also, by making parties defendant the firm of Baring Brothers & Co., who have obtained leave to answer as such; and also, Arnoldus Vanderhorst Dawson, Maria Simons, Jane V. Bowley, executrix of Jane V. Heyward, holders of fire-loan stock payable within the United States, and as representing that class of creditors; and that, upon the coming in of the answers of the attorney-general in behalf of the State of South Carolina, and of Baring Brothers & Co., and of the aforesaid holders of the fire-loan stock, made parties defendants, or an order obtained that the bill be taken pro confesso against them, the case at and after the first day of June next be referred to Mr. Tupper, one of the masters, to inquire into and report on the matters set forth in the pleadings, and to take such evidence as the parties may offer in support of the matters charged in the bill or denied in the answers, with leave to report any special matter.

"2. That the said master, by public advertisement in one or more leading newspapers in the cities of Charleston, Cincinnati, New Orleans, New York, and Augusta, call in any person or persons claiming to be creditors, holding bills or notes of the corporation known as
56 as 'The President and Directors of the Bank of the State of South Carolina,' to make proof of their claims on or before the first day of June next ensuing. Also notifying, by said advertisement, all creditors residing in the United States holding State stock, for which said corporation has been made liable by law, said stock being described in the pleadings as fire-loan bonds 'owned in the United States,' to make proof of the same within the same period.

"3. In all cases of persons claiming, whether said claims consist of bonds, fire-loan stock, or bank-bills, due notice of the application to make proof shall be given to the parties to the bill and answers in these proceedings, or their solicitors; and in all such cases where parties claiming shall hold or be possessed of any securities, given and accepted as security for the claims by him or them made, such party or parties shall, on presentation of such claims, make a statement of such securities and their probable value, and also a statement of the time when the claim or claims presented came into his, her, or their possession, and the consideration paid therefor, that the same may be considered by this court in determining the amount of such claims and the disposition of such securities.

"4. It is further ordered that, upon the coming in of the answers of the attorney-general in behalf of the State of South Carolina, of Baring Brothers & Co., and of such parties in the United States holding fire-loan stock as shall have answered in this case on or before the 1st day of June next, or upon order obtained against any such last-mentioned

parties, that the bill be taken as confessed, after service of process to answer, then the said 'The President and Directors of the Bank of the State of South Carolina,' Charles M. Furman, president, and Thomas R. Waring, cashier of the said bank, do account before Mr. Tupper, one of the masters, for the capital, property, and assets of said corporation in their hands, under their control, (under such regulations as the said master may prescribe,) to the end that the case may, as speedily as possible, be prepared for a hearing.

"5. It is further ordered that, to avoid multiplicity of suits and waste of the fund, until such hearing can be had, and a decree
57 rendered in this case, all the creditors of the said corporation, whether billholders, bondholders, or claimants in any other form, are enjoined from all proceedings in law or equity against such corporation, its property or assets, except as parties to these proceedings.

"6. It is further ordered that, in consideration of said injunction of the creditors of said corporation from bringing suit againt the same. the said corporation and the said Charles M. Furman and Thomas R. Waring are hereby enjoined, until the said hearing and decree shall be had and rendered, from paying over any portion of the assets (moneys deposited since December, 1865, excepted,) of said corporation except for current expenses, including counsel fees and expenses of conducting the defence of this suit, to any creditors of the same, unless by special order of the court, without prejudice, however, to the right of these parties to collect debts of the corporation and to change the form of assets in possession.

"7. It is further ordered that the parties to these proceedings now before the court, and those who may hereafter be made parties, have leave to apply to this court for any additional order or orders, or any modification of the above orders which may become necessary, in the progress of this cause, the above orders not being intended to conclude or in any way preclude the rights or equities of the parties to this suit.

(Signed) "J. P. CARROLL.

"MARCH 3, 1868"

On the 25th day of March, 1868, a dedimus potestatem was issued to take the answer of Baring Brothers & Co.

On the 3d day of April, 1868, the answer of Isaac W. Hayne, then attorney-general of the State, was filed, vindicating the propriety and constitutionality of the act of 1865, preferring certain creditors.

On the 15th of April, 1868, the answer of Maria Simons and others was filed, by their solicitors, Hayne & Son, alleging that they
58 were owners of certain stock of the State, issued under the act of 1838, which, under the provisions of said act, was guaranteed by the bank, and claiming the benefit of said act as well as of the act of 1865.

On the 20th day of May, 1868, the answer of Arnoldus Vanderhorst Dawson was filed by Simons & Siegling, solicitors, to the same effect.

The answer of Baring Brothers & Co., having been returned from Europe, was filed by Hayne & Son, solicitors, on the 26th of May, 1868. This answer being on file, and printed copies ready to be furnished to the court, and to all the parties interested, it is deemed unnecessary to state its contents at length. It substantially confirms and amplifies the preceding answers, recites the 10th, 11th, and 12th sections of the act of 1838, which read as follows, to wit:

"SEC. 10. It shall be the duty of The President and Directors of the Bank of the State of South Carolina to make proper provision for the

punctual payment of the interest of such loan as may be effected upon the credit of the State, under the provisions of this act, and also for the ultimate payment of the principal thereof.

"SEC. 11. It shall be the duty of The President and Directors of the Bank of the State of South Carolina to cause to be opened in the books of the said bank an account in which they shall debit themselves with the profits arising out of the additional capital created out of the two millions loan aforesaid, for the year ending on the 1st day of October, A. D. 1839, and with all the future profits of the said loan, as the same shall be hereinafter annually declared, which said fund, with all its accumulations, shall be considered so'emnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof, and it shall be the duty of the president and directors of the said bank annually to report to both branches of the legislature the exact state of that fund.

"SEC. 12. When the profits of the said Bank of the State of South Carolina shall have paid the interest of certain stocks and redeemed the said stock, for which they have heretofore been pledged and set
59 apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and final redemption thereof."

And said answer sets forth the form of the fire-loan bonds, of the coupons attached thereto, and of the endorsements thereon, as follows, to wit:

"UNITED STATES OF AMERICA,
"*State of South Carolina:*

"£1,000 or "£500	"*Loan under an act for rebuilding the City of Charleston.* "FIVE PER CENT. STOCK.	£1,000 or £500	Stg.

"No.

"By his excellency Pierce M. Butler, governor and commander-in chief in and over the said State:

"Be it known that there is due from the State of South Carolina to The President and Directors of the Bank of the State of South Carolina, one thousand pounds (or five hundred pounds) sterling, lawful money of Great Britain, which sum of money the said State promises to pay the said President and Directors of the Bank of the State of South Carolina, or their assigns in London, on the surrender of this certificate, on the first day of July, in the year of our Lord one thousand eight hundred and sixty-eight, (one thousand eight hundred and fifty-eight,) with interest thereon at the rate of five per cent. per annum, payable semi-annually from the date thereof, as it becomes due, on presenting the several warrants hereunto annexed, at the banking-house of Baring Brothers & Co., in London.

(Signed) PIERCE M. BUTLER,
Governor.

Countersigned by—
[SEAL.] W'M EDWARD HAYNE,
Comptroller-General.

To the bonds were attached the following coupons, signed by the cashier of the bank, to wit:

"SOUTH CAROLINA STATE STOCK.

"Under an act ratified 1st June, 1838.

"BARING, BROTHERS, & Co., *London:*

"Pay to bearer, on 1st July, 1839, twenty-five pounds (or twelve pounds ten shillings) sterling, being a half year's interest on bond No. for £1,000 (or £500) sterling.

£25 or £12 10s. } Sterling.

(Signed) "C. M. FURMAN,
"*Cashier of Bank of State of South Carolina.*"

On the bonds was the following endorsement, signed by the president of the bank, to wit:

"In pursuance of and by authority of an act of the legislature of the State of South Carolina, ratified on the first day of June, one thousand eight hundred and thirty-eight, The President and Directors of the Bank of the State of South Carolina, with a capital of three millions one hundred and fifty thousand dollars, (including the present loan,) for value received, assign and transfer the within bonds to , or bearer, and hereby guarantee the punctual payment of the principal and interest of the said bond, as it becomes due, at the place specified within.

(Signed) "C. J. COLCOCK,
"*President of the Bank of the State of South Carolina.*"

The answers being now all in, a reference was called before James Tupper, master, in accordance with the decretal order of Chancellor Carroll. Mr. Tupper is since dead. The following is an extract from his diary:

"DABNEY, MORGAN & Co.,
vs.
THE BANK OF THE STATE OF SOUTH CAROLINA.

1868. FEBRUARY 27.—Proposed order of reference and to call in creditors reserved by chancellor.

MARCH 3.—Order to call in creditors and of reference.

61 MARCH 16.—REFERENCE.—Advertisement under decree prepared for creditors to prove claims.

MARCH 17.—First claims presented, through solicitors.

Inserted notice to creditors in papers, as required by decree.

MAY 16.—REFERENCE.—Considered scheme of master's report as to amendment to decree.

MAY 18.—REFERENCE.—Report read and filed.

MAY 19.—Report submitted.

Amended order granted by chancellor.

MAY 20.—REFERENCE.—Conference and conclusion on notice under amended order, and employment of cashier of bank to count and assort bills—6 Ref. B, 340, to wit: Mr. Hayne presented order amending decree of 3d March, 1868.

Following matters agreed upon:

1. That master advertise in some papers the amended order of 19th May, 1868.

2. That master employ T. R. Waring, cashier Bank of State, to count and assort bills until 1st June, and pay him $250.

3. That bank advance costs incurred by master for advertising.

Conference with Mr. Waring. He accepts above, he to give certificate to master of amount presented; master, upon receipt of certificate, to give claimant acknowledgment of deposit; statement of time and consideration to be filed with the master.

JUNE 13.—REFERENCE.—Conference on means to pay master for his advances.

AUGUST 5.—Tho's R. Waring handed in schedule of claims presented

The following are the report and order made and filed on the 19th May, 1868, alluded to in Mr. Tupper's diary:

62 DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina. } In equity.

Report of James Tupper, master in equity.

To the honorable the chancellors:

Under the decretal order of Chancellor Carroll, filed in this case on the 3d March, 1868, all persons claiming to be creditors holding bills or notes of the Bank of the State of South Carolina have been called in, by public advertisement in Cincinnati, New Orleans, New York, Augusta, and this city, to make proof of their claims on or before the first day of June ensuing.

In response to this call, claims, to a large amount, have been presented, and vouched by the production of the bills of the bank.

It has been submitted that this proof on the part of the billholders is not a sufficient compliance with the order of the 2d March, which order, it is claimed on the part of the bank, requires each billholder to accompany his claim with a statement of the time when the bills were received by him, and the consideration paid therefor.

This construction is manifestly not the one placed upon the order by the claimants now before the master, inasmuch as no one of these has presented proof of the time when he received the bills or of the consideration paid for them. The master, being himself doubtful whether the construction of the bank is the correct one, submits respectfully the question to the court.

Should it be held that the time and consideration must be proved, then it would seem to be proper that the period be extended, within which the said proof is to be rendered.

(Signed) JAMES TUPPER,
Master in Equity.

MAY 18, 1868.

"On reading the report of Master Tupper in the above case, dated May 18, 1868, and, it appearing that the notice of the motion has been given to the solicitors of the billholders, on motion of Hayne &
63 Son, for defendant, it is ordered that, with a view to remove the ambiguity suggested in the master's report, and to make it ex-

plicit, the true intent and meaning of paragraph 3 of the decretal order, signed by Chancellor Carroll, 3d March, 1868, and referred to in the master's report, the last provision of said paragraph, beginning with the words "and also," be amended to read as follows: "All persons presenting claims in the above case, including the holders of bills or bank-notes, are required, in addition to the proof of the claims, to render into the master's office a statement verified by affidavit, of the time when the same came into the possession of the holder, and the consideration paid therefor. It is further ordered that all parties who have presented, or shall present, their claims, before Master Tupper, before the 1st of June, shall be allowed until the 1st day of July next, within which to supply the statement as to the 'time' the claims were acquired, and the 'consideration' paid for them. But nothing in the order contained shall be construed as extending the period for presenting claims beyond the 1st day of June.

"It is further ordered that notice of the amended order and the extension of time be published by the master in all the gazettes in which he has published the original order, and that he further give notice that neither the amended order or the order hitherto made are intended to conclude or in any way prejudge the rights or equities of the parties to this suit.

(Signed) HENRY D. LESESNE."

MAY 19, 1868.

The advertisements referred to were as follows, published in the Charleston Courier, Cincinnati Commercial, New Orleans Picayune, New York Journal of Commerce, and Augusta Constitutionalist.

THE STATE OF SOUTH CAROLINA,
Charleston District:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina. } In equity.

64 Upon hearing the bill and answers in this case, it is ordered:

2. That the said master, by public advertisement in one or more leading newspapers in the city of Charleston, Cincinnati, New Orleans, New York, and Augusta, call in any person or persons claiming to be creditors holding bills or notes of the corporation known as "The President and Directors of the Bank of the State of South Carolina," to make proof of their claims, on or before the first day of June next ensuing. Also notifying, by said advertisement, all creditors residing in the United States holding State stock for which said corporation has been made liable by law, said stock being described in the pleadings as "fire-loan bonds," to make proof of the same within the same period.

3. In all cases of persons claiming, whether said claims consist of bonds, fire-loan stock, or bank-notes, due notice of the application to make proof shall be given to the parties to the bill and answers in these proceedings or their solicitors, and in all such cases where parties claiming shall hold or be possessed of any securities given and accepted as security for the claims by him or them made, such party or parties shall, on presentation of said claims, make a statement of such securities and their probable value, and also a statement of the time when the claim or claims presented came into his, her, or their possession, and the consideration paid therefor, that the same may be considered by this court

in determining the amount of such claims and the disposition of such securities.

(Signed) J. P. CARROLL.

MARCH 3, 1868.

OFFICE OF THE MASTER IN EQUITY,
Charleston, March 16, 1868.

In pursuance of the order of Chancellor Carroll, made in the above-stated case, extracts of which are now set forth, all persons therein referred to are hereby notified to make proof before me of their respective claims on or before the 1st day of June next ensuing, at my office, in the city of Charleston.

JAMES TUPPER,
Master in Equity.

65 [Second advertisement.]

Bills of the Bank of the State of South Carolina.

DABNEY, MORGAN & CO.
vs.
THE BANK OF THE STATE OF SOUTH CAROLINA.

OFFICE OF MASTER IN EQUITY,
Charleston, May 20, 1868.

The attention of parties who have presented or may hereafter present to this office bills of the Bank of the State of South Carolina is specially called to the following extract from an amendatory order made in the cause on the 19th May, 1868:

1. All persons presenting claims in the above case, including the holders of bills or bank-notes, are required, in addition to the proof of the claims, to render into the master's office a statement, verified by affidavit, of the time when the same came into the possession of the holder and the consideration paid therefor.

2. It is further ordered that all parties who have presented or shall present their claims before Master Tupper before the 1st day of June shall be allowed until the 1st day of July next within which to supply the statement as to the time the claims were acquired and the consideration paid for them. But nothing in the order contained shall be construed as extending the period for presenting claims beyond the 1st day of June.

3. It is further ordered that neither the amended order or the orders hitherto made are intended to conclude or in any way prejudge the right or equities of the parties to this suit.

JAMES TUPPER,
Master in Equity.

Exhibit A gives a list of billholders who proved their claims.

Exhibit B gives a list of fire-loan stockholders.

Exhibit C gives a list of other creditors.

Exhibit D gives the statement of "time," when received, and the "consideration" paid for bank-bills.

On the 15th September, 1868, an act was passed by the legislature, entitled an act to close the operations of the Bank of the State of South Carolina, which contained, among other things, the following provisions, to wit:

"That the governor of the State is hereby authorized and
66 required for and on behalf of the State to take possession of all

the real and personal estate, assets, choses in action, and books of accounts of the corporation known as 'The President and Directors of the Bank of the State of South Carolina,' in whose hands soever found, and sell at public auction, at such times and on such terms as he shall deem most advantageous to the State, all the real and personal estate, stocks, bonds of the corporation, and other assets of the said corporation, and the personal bonds, notes, and bills of exchange owned by said corporation, and all debts and choses in action due the said corporation he shall place in the hands of the attorney-general of the State, with instructions to institute, in the name of the said corporation, legal proceedings to collect the amount so due as speedily as possible, and the proceeds of said sales and all collections made by the attorney-general shall be deposited in the treasury of the State, subject to the order of the governor, who shall keep a distinct account thereof, separate and distinct from the other accounts of the State, and shall report the same to the next succeeding session of the legislature: provided, always, that suits shall not be instituted upon any debts which, in the opinion of the governor and attorney-general, are valueless."

A bill, I am informed, was, on the 12th day of October, 1868, filed by Baring Brothers & Co. in the Federal court, the purpose of which was to enjoin proceedings under this provision of said act. And a few days afterwards a rule was served on The President and Directors of the Bank of the State of South Carolina to show cause why a mandamus should not issue against them, commanding them to deliver over the assets of the bank to the governor, according to the requirements of said act.

This rule, upon argument before Associate Justice Willard, was ordered to be discharged on the ground of the pendency of the suit of Dabney, Morgan & Co. in this court.

On the 13th October, the American Bank-Note Company, by C. R. Miles, solicitor, filed their petition to be made parties defendant, with leave to file their claim for engraving notes, &c., and it was so ordered.

67 On the 10th and 19th days of November, 1868, Chancellor Lesesne, at a regular term of the court of equity made the following orders permitting certain parties to withdraw claims:

IN RE DABNEY, MORGAN & CO.
vs.
BANK OF THE STATE OF SOUTH CAROLINA, et al.

Ex parte N. N. Marsh, M. Loth, M. C. Mordecai and the Graniteville Manufacturing Company.

On motion of Porter & Connor, solicitors for parties above-named, it is ordered that the said parties have leave to withdraw the claims and proofs, and withdraw from the case, for the purpose of funding said bills under the act of 1868.

It is further ordered that, upon the withdrawal of the claims and proofs, that Mr. Tho's R. Waring who holds the bills as custodian for the late master in equity, Mr. James Tupper, do deliver to the said parties, or their counsel, the bills filed in their cases respectively.

(Signed) HENRY D. LESESNE.

We consent.

HAYNE & SON.

NOVEMBER 10, 1868.

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina. } In equity.

The general assembly having passed an act, ratified on the 15th day of September, A. D. 1868, whereby provision is made for the funding of certain bills of the Bank of the State of South Carolina, it is, on motion of Simonton & Barker, representing certain of the billholders in the cause, ordered that any persons who have proved their bills, under the orders heretofore made herein, have leave to withdraw the same, upon surrendering the receipt and certificate given them therefor, to Tho's R. Waring, esq., who has been made the special custodian of said bills, and that upon such surrender the said Thomas R. Waring do deliver their bills to the persons requiring them.

J. P. CARROLL.

We consent.

HAYNE & SON.

68 On the 23d day of November, 1868, Chancellor Carroll made the following order transferring the case to Master Gray:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina, Baring Brothers & Co., et al.

Upon motion of I. W. Hayne and J. B. Campbell, solicitors for Baring Brothers & Co., it is ordered that the case be transferred from the office of the late James Tupper, esq., to J. W. Gray, esq., master.

It is further ordered that the said Master Gray report what has been done in the cause before the late Master Tupper, and that he do such other and further acts in the premises, and take such evidence as *to* the nature of the case may require and report thereon to the court, with leave to report any special matter.

(Signed) J. P. CARROLL.

NOVEMBER 23, 1868.

On the 30th day of November, 1868, Chancellor Carroll presiding, at the same term of the court, made the following further decretal order, to wit:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina.

The present motion is submitted by the counsel of Baring Brothers & Co., representing the fire-loan bondholders in Europe, and Maria Simons and others, representing the fire-loan stockholders in America, who constitute the largest number of the creditors of said bank, with the exception of those holding the bills of that institution. It appears that the plaintiff's solicitors were notified that this motion would be made. These gentlemen have not appeared and make no opposition. The mo-

tion may be considered then at the instance of the creditors of the bank, without opposition from the corporation, or from any other quarter, except the attorney general, who seems, upon the present state of the
69 pleadings, to be a party defendant merely for the purpose of sustaining the validity of the act of 1865, referred to in the pleadings, by which act the creditors who make this motion were preferred in the appropriation of the assets of the bank, made by the said act.

In Thompson vs. Palmer, 2 Rich. Eq. R. 36, it is said when an executor or administrator come for the aid of the court in administering the estate in his hands, the court should be placed in possession of the fund to be administered. "We should not be required," adds the court, "to enjoin creditors from proceeding elsewhere, unless we are placed in possession of the funds to which the creditors are entitled, so as to enable us to satisfy all the just rights with which we have interfered. In the case cited the suit was for the administration of an insolvent estate, and the purpose of the bill here exhibited is to have administered the estate of and effects of an insolvent corporation. The usual decree for an account or quod computet is sufficient to warrant the interference with proceedings at law." Such proceedings are enjoined by the court, "because it considers the decree it has made in the nature of a judgment for all the creditors, and having taken the fund into its own hands it will administer it equitably, and not permit the executor to be pursued at law." (Thompson vs. Brown, 4 John. C. R., 643; 3 Dan'l Practice, 1717, and cases cited.) It is very well settled, says the court, that when a creditor files a bill for discovery of assets, whether specifically for himself or jointly for all the creditors, and the court by that means gets possession of the assets, the possession draws after it the entire distribution of the fund. Manigault vs. Deas, Bailey Eq. R, 297. According to the course and practice of this court in many instances, and perhaps ordinarily in cases of this character, the executor or trustee is not required to pay or transfer the moneys or assets in his hands to the master or commissioner, or to a receiver. If parties interested in the assets and effects are satisfied of the executor's or trustee's efficiency and fidelity, and of their safety in his custody, and are content that they shall so remain, the court will not of its own motion interfere.

But undoubtedly in such cases the assets and effects are held
70 by the executor or trustee subject wholly and exclusively to the order and disposition of the court.

It appears certainly from the proceedings in the cause, which have been adverted to, that the court has assumed the control of the fund and has entered upon its administration. "It has tied up every hand that could intermeddle with it, and opened the doors of controversy to all making claims against it."

The assets of the bank are undoubtedly "a fund in equity." They have become so by order of this court, made by consent of all parties interested. They have been permitted to remain in the custody of Charles M. Furman and Thomas R. Waring, against whom process was prayed individually and officially as parties in possession when the bill was filed.

The object of the motion is to secure, until a hearing of the cause and a distribution of the assets, the same custody which has been approved by the creditors, who alone are entitled to the fund.

In sheer justice to the creditors whom it has enjoined, and in order that effect may be given to it, its final decree when pronounced, the court is bound to guard against the assets and effects of the bank being withdrawn from its control,

Charles M. Furman and Thomas R. Waring, whether as president and cashier, or individually, though defendants, have no interest, official or personal, which could influence the impartial discharge of their duties.

It has not been intimated that the fund is not entirely secure in the hands of Messrs. Furman and Waring. Nor does it appear that the fund would be safer in the hands of the master than in the custody of those defendants, both of whom have executed bonds, with securities, for the faithful performance of their duties as officers of the bank. If a receiver were to be appointed upon the terms of his executing the usual bond, with adequate sureties required in such cases, it might well be doubted, in consequence of the pecuniary ruin which overspreads the State, whether any person could be found willing to accept the office upon such condition.

It is not deemed necessary or advisable to pass the order pro-
71 posed, and its purpose may be sufficiently and effectually accomplished by enlarging the terms and operation of the injunction to which Messrs. Furman and Waring are made subject by the sixth paragraph of the order of the 3d March, 1868.

"It is ordered and adjudged that the defendants, Charles M. Furman and Thomas R. Waring, be enjoined, until the further order of the court, from aliening, transferring, assigning, disposing of, or in anywise parting with, the possession of any portion of the assets or property of the corporation known as 'The President and Directors of the Bank of the State of South Carolina,' unless by the special order of the court, provided that nothing herein contained shall be construed as conflicting with the provisions of the sixth clause of the order hereinabove referred to, of the 3d of March last.

(Signed "J. P. CARROLL.'

NOVEMBER 30, 1868.

On the 24th day of December, 1868, the following order was made:

"Ex parte J. B. Campbell.

"It is ordered that it be referred to Master James W. Gray, esq., to ascertain and report a proper retainer and compensation for Mr. Campbell's services in defence of the fund in court, (the property and assets of the bank of the State,) in the matter of the application for a mandamus in behalf of the State, already heard before Mr. Justice Willard, and also a proper retainer in the matter of the writ of error before the supreme court, to be paid out of the said fund.

"HENRY D. LESESNE."

DECEMBER 24, 1868.

On the 30th day of December the following report was made, in pursuance of said order, to wit:

"Ex parte James B. Campbell.

"To the chancellors of the State:

"This case was referred to me to ascertain and report proper compensation for Mr. Campbell's services in defence of the fund
72 in court, (the property and assets of the bank of the State,) valued at half a million dollars, or more,) in the matter of the application for a mandamus in behalf of the State, already heard before Judge Willard, and also a proper retainer in the matter of the writ of error before the supreme court.

"I respectfully report that the late Master Tupper, in his life-time, certified that a proper general retainer to counsel for defence in the

original suit was one thousand dollars. I should adopt his estimate for the special retainer in this new matter, which certainly involved not less of professional responsibility and skill. But it appears the president and directors who then had the custody of the fund, while recognizing their duty to defend it and employ counsel, were timid about the payment. They preferred that Mr. Campbell's compensation should be contingent upon success before Judge Willard. If the defence failed he was to receive nothing; if it succeeded, then he was to be paid a sum equal to the value of his services, and the risk he took of not being paid at all. This is what I understand by their agreement that Mr. Campbell's compensation should be contingent upon success, and I think, as he put at hazard the one thousand dollars he was entitled to, and the fund would have saved that amount if his defence failed, that he should be paid double—say two thousand dollars for this service.

"As to the proper retainer for the writ of error, I recommend that no further arrangement to make that contingent upon success be allowed, but that a proper retainer for this service be paid, which will be one thousand dollars. I therefore recommend that there be paid to Mr. Campbell out of the fund two thousand dollars in full for the contingent fee agreed upon for the case before Judge Willard, and that the sum of one thousand dollars be paid in like manner as a proper retainer on the writ of error in the supreme court.

"Respectfully submitted.

(Signed) "J. W. GRAY,
"*Master in Equity.*

"DECEMBER 29, 1868."

73 Upon the coming in of the above report Chancellor Lesesne made the following order:

"Ex parte James B. Campbell.

"On hearing the master's report, the same is, on motion of Mr. Campbell, confirmed, and Messrs. Charles M. Furman and Thomas R. Waring, the special custodees of the fund in this case, are hereby authorized and required to pay therefrom the sum of three thousand dollars, as recommended by the master, taking receipt therefor.

(Signed) "HENRY D. LESESNE."
DECEMBER 30, 1868.

Filed December 31, 1868.

The next day the following order was made, to wit:

"On motion of James B. Campbell, esq., it is ordered that the order filed in this case, on the 31st inst., directing compensation to be paid to the said James B. Campbell be extended to his associate, Isaac W. Hayne, esq., and that the said Isaac W. Hayne be paid the same amount and in like manner.

(Signed) "HENRY D. LESESNE."
DECEMBER 31, 1868.

On the 31st day of December, 1868, the following order was submi ted and adopted:

"On motion of Messrs. Hayne & Son, it is ordered that it be referred to Master Gray to tax the costs accrued in the above case up to this date, and that so much of the said costs as shall be found to be due to the offices of the master and register, which offices expire this day, be

paid to them respectively, and that the taxation of costs for the solicitors be filed with the pleadings, to wait the result of the suit.

"It is further ordered that the said costs of master and register be paid from the money, to wit, the ⅛ of 1 per cent. collected from
74 parties withdrawing notes from the master's office for the purpose of funding them, provided the amount collected thus be sufficient, and if otherwise, that the deficiency be paid from the amount in controversy.

(Signed) "HENRY D. LESESNE."

DECEMBER 31, 1868.

The taxation was made and the amount paid to Mr. Gantt, the register in equity, and to the representatives of the late Master Tupper.

On the day of , 1869, the following decision, I am informed, was announced by Chief Justice Moses in the case of mandamus against the President and Directors of the Bank of the State of South Carolina, to wit:

"THE STATE OF SOUTH CAROLINA:

"In the supreme court.

"THE STATE EX RELATIONE THE ATTORNEY-General
"*vs.*
"THE PRESIDENT AND DIRECTORS OF THE Bank of the State.

"*Mandamus.*

"This cause came on to be heard on the transcript of the record from Associate Justice Willard, sitting in chambers, at Charleston, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the rule for the mandamus be dismissed, because so much of the act No. 17, entitled 'An act to close the operations of the Bank of the State of South Carolina,' as authorizes and requires the governor 'for and on behalf of the State, to take possession of all the real and personal estate, assets, choses in action, and books of account of the corporation known as The President and Directors of the Bank of the State of South Carolina, in whose hands soever found, and sell at public auction at such time and upon such terms as he shall deem most advantageous to the State, all the real and personal estate, stock, bonds of the corporation, and other assets of said corporation, and the personal bonds, notes, and bills of exchange owned by
75 said corporation' is in conflict with article 1, section 10, paragraph 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts."

On the 19th day of March, 1869, the following order was made by Judge Carpenter, sitting on the equity side of the court of common pleas, to wit:

"It appearing that Etienne Poincignon and Archibald S. Johnson, trustees, have filed their bill of complaint in this court against the said The President and Directors of the Bank of the State of South Carolina, wherein they set forth a certain bond and mortgage held by them, executed by the said president and directors, and that a portion

of said bond is now due and in arrear, and pray for a foreclosure of the mortgage and sale of the mortgaged premises, and that the proceeds of such sale be applied to the payment of the bond, and the cost of the proceedings thereon; and it appearing further that the said defendants, 'The President and Directors of The Bank of the State of South Carolina,' have filed a plea in bar to said bill of complaint, where they set forth the proceedings in the above-entitled case of Dabney, Morgan & Co., and the injunction therein, and that the said plea has been overruled and the defendants ordered to answer said bill of complaint.

"On motion of Hayne & Son, solicitors for The President and Directors of the Bank of the State of South Carolina, Maria Simons, Jane Bowley, and Edmund Bowley, her husband, and Baring Brothers & Co., defendants:

"It is ordered that it be referred to J. W. Gray, esq., special referee, to take an account of the sum due and in arrear on the bond and mortgage aforesaid, as well as the sums to accrue thereon, and the time or times when the same shall fall due, and to report thereon to the court, and that he report further whether it will not be to the advantage of all the defendants and creditors in this suit that Charles M. Furman and Thomas R. Waring, custodees of the fund, have leave to pay so much of the said debt as is now due and in arrear out of any of the funds or assets of the said 'The President and Directors of the
76 Bank of the State of South Carolina,' at this time, and that the sums which shall become due and in arrear hereafter shall also be paid in like manner when the same shall fall due, without a sale and foreclosure of the mortgage under the pleadings aforesaid.

(Signed) "R. B. CARPENTER."

MARCH 9, 1869.

And on the 20th day of March, 1860, the following order was made, to wit:

"Upon motion of Hayne & Son, solicitors for 'The President and Directors of the Bank of the State of South Carolina,' it is ordered that the above-entitled cause be referred to James W. Gray, as special referee, to ascertain and report what has been done in the same, pursuant to the orders already passed thereon, and that the said referee proceed with and complete the accounting ordered and begun under the said orders, and that especially he take an account of the assets and credits of said bank, with power to take testimony and do and perform such other acts as may be neceesary to prepare the cause for a final hearing, and report thereon at the next regular (June) term of this court.

"It is further ordered that the said referee report a scheme for the sale and distribution of the fund in controversy among the creditors and claimants thereof, with leave to report any special matter.

(Signed) "R. B. CARPENTER."

MARCH 20, 1869.

I have thus recited, at length, all the proceedings in the cause which appear to bear upon the questions made by the pleadings; but for the convenience of the court and the counsel, I append an exhibit marked E, taken from the file-book of the court, which cites all the papers filed in the cause to the date of the reference to me as special referee.

Respectfully submitted with the schedules.

(Signed) JAMES W. GRAY, *Referee.*

77 EXHIBIT E.—*Extract from file-book of C. E.*

DABNEY, MORGAN & CO.
vs.
BANK OF THE STATE OF SOUTH CAROLINA ET AL.

OCTOBER 30, 1867.—Bill for account, injunction, and relief. Magrath & Lowndes.

JANUARY 24, 1868.—Order pro confesso. Register Gantt.

FEBRUARY 3, 1868.—Order to set aside same. Ch. Carroll.

Answer of President and Directors of the Bank of the State of South Carolina. Hayne & Son.

Separate answer of C. M. Furman. Hayne & Son.

Separate answer of T. R. Waring. Hayne & Son.

JULY 22, 1868.—Petition in re, ex parte Tho's. J. McNesh and *and* Joseph S. Baynard. Whaley, Mitchell & Clancy.

JULY 25, 1868.—Petition in re, ex parte Baring Brothers & Co. Hayne & Son.

Order on above petition. Ch. Carroll.

MARCH 3, 1868.—Order to amend and make parties of reference and to call in creditors. Ch. Carroll.

MARCH 25, 1868.—Order for dedimus potestatum. Master Tupper.

APRIL 3, 1868.—Answer of attorney-general of South Carolina. I.W. Hayne.

APRIL 16, 1868.—Joint and several answers of Maria Simons, et al. Hayne & Son.

MAY 18, 1868.—Petition of Joshua and Tho's Green in re.

MAY 19, 1868.—Report. Master Tupper.

Decretal order. Ch. Lesesne.

MAY 20, 1868.—Separate answer of A. V. Dawson. Simons & Siegling.

MAY 26, 1868.—Dedimus potestatum and return. Answers of Baring Brothers & Co. Hayne & Son.

OCTOBER 13, 1868.—Petition of American Bank-Note Company. C. R. Miles.

Order on petition. Ch. Lesesne.

NOVEMBER 10, 1868.—Decretal order for several parties to withdraw their claims, &c. Ch. Lesesne.

78 NOVEMBER 19, 1868.—Petition in re. Hayne & Son, Campbell & Seabrook, & Simons & Siegling.

Decretal order for withdrawal of claims. Ch. Carroll.

NOVEMBER 20, 1868.—Order to take petition off file. Ch. Carroll.

NOVEMBER 23, 1868.—Order transferring case to Master Gray. Ch. Carroll.

NOVEMBER 24, 1868.—Decretal order in case of M. Loth. Ch. Carroll.

NOVEMBER 30, 1868.—Decree on appointment of receiver. Ch. Carroll.

DECEMBER 11, 1868.—Ex parte Isaac W. Hayne, trustee. Isaac Hayne.

DECEMBER 18, 1868.—Order granting leave to Hayne to prove claim. Ch. Lesesne.

Decretal order ex parte Jno. English with affidavit. Ch. Lesesne.

DECEMBER 24, 1868.—Decretal order (ex parte Ja's B. Campbell) of reference. Ch. Lesesne.

DECEMBER 29, 1868.—Proof of claim of fire-loan. Isaac Hayne.

DECEMBER 30, 1868.—Decretal order ex parte Miles Moran. Ch. Lesesne.

Report ex parte Ja's B. Campbell. Master Gray.

Decretal order ex parte J. B. Campbell. Ch. Lesesne.

DECEMBER 31,1868.—Decretal order to pay I. W. Hayne counsel fee. Ch. Lesesne.

Decretal order for taxation costs. Ch. Lesesne.

MARCH 19, 1869.—Order of reference. R. B. Carpenter.

MARCH 20, 1869.—R. B. Carpenter.

I hereby certify that the foregoing is a correct copy of the original report in this cause of file in this office.

Witness my hand this 9th October, 1868.

[SEAL.]

A. C. RICHMOND,
C. C. C. P., Charleston County.

[End of Part I of report of J. W. Gray, special referee.]

79 CHARLESTON COUNTY, *S. C.:*

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE Bank of the State of South Carolina, Baring Brothers, & Co.

Supplemental report of James W. Gray, special referee.

To the honorable the judge of the circuit court:

On the 19th July last I filed, as special referee, a partial report in the above case, acting under an order hereafter cited.

Part first of my report brings the proceedings in the case up to March 20th, 1869. Some confusion it seems has arisen in regard to the reference in this report to the exhibits filed with it. The exhibits on file with said report are as follows:

Exhibit A, a book containing a list of billholders.

Exhibit B, a book containing these names repeated with a statement of the "time" when received, and the "consideration" paid for said bills.

Exhibits C and E give lists of fire-loan stockholders whose claims were proved. There is no list of general creditors other than the above, and no exhibit marked D.

The extract from the file-book is marked Exhibit E, as well as the partial list of fire-loan stockholders.

The following extract from the file-book, beginning when that extract ceased, is appended for easy reference:

1869. MARCH 29.—Report, with testimony. J. W. Gray, referee.

APRIL 3.—Affidavit T. R. Waring; testimony. Hayne & Son.

Order. R. B. Carpenter.

80 APRIL 6.—Petition in re, ex parte Mordecai. Porter & Conner.

Order. R. B. Carpenter.

APRIL 12.—Petition in re, ex parte Geo. W. Williams & Co. Buist & Buist.

Order giving leave to prove claim. R. B. Carpenter.

Petition in re, ex parte Geo. W. Williams. Buist & Buist.

Order giving leave to prove claim. R. B. Carpenter.

APRIL 13.—Order extending time to make proof of claims. R. B. Carpenter.

APRIL 17.—In re American Bank Note Co., order of substitution. R. B. Carpenter.

APRIL 22.—Order appointing receiver. R. B. Carpenter.

APRIL 23.—Receiver's bond. W. C. Courtney.
APRIL 28.—Grounds of appeal. Hayne & Son.
Petition of Tho's R. Waring. Hayne & Son.
Order. Judge Carpenter.
Order to appoint an agent to examine condition of certain securities. Judge Carpenter.
APRIL 29.—Order for transfer bills or notes. Judge Carpenter.
MAY 1.—Order granting dedimus. Judge Carpenter.
Dedimus potestatum. Judge Carpenter.
MAY 26.—Order of reference. Judge Carpenter.
JUNE 10.—Report. B. F. Dunkin.
JUNE 15.—Order confirming report for payment of fee to Messrs. Hayne & Son. Judge Carpenter.
JUNE 16.—Order to receiver, W'm C. Courtney. Judge Carpenter.
JULY 10.—Ex parte Tho's R. Waring; petition for court to fix compensation for services. Hayne & Son.
Order of reference to R. S. Duryea. R. B. Carpenter.
JULY 16.—Report with statement and testimony. R. S. Duryea, referee.
Order granting leave to J. W. Gray, special referee, to file report and hold references. R. B. Carpenter.
Order to pay Mr. Dunkin's fee, $200. R. B. Carpenter.

81 Order to pay clerk's costs. R. B. Carpenter.
JULY 19.—Report with Exhibits A, B, C, D, E, and F., J. Gray, special referee.
OCTOBER 22.—Ex parte S. C. Loan and Trust Co. petition for leave to prove claim. Henry Buist.
Of these proceedings it is only necessary to notice the following:

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina.

1. On motion of D. H. Chamberlain, attorney-general, W'm C. Courtney is hereby appointed to be receiver of all the assets and other property whatsoever of the corporation known as "The President and Directors of the Bank of the State of South Carolina," upon his filing in this court his bond in the sum of thirty thousand dollars, with sureties to be approved of by this court, to duly hold, keep, account for and pay the said assets and property under and according to the orders and decrees hereafter made by this court.

2. And it is ordered that the defendants Charles M. Furman and Thomas R. Waring do deliver over, without delay, to the said W'm C. Courtney, the receiver herein-before appointed, the possession of all the real estate, personal property, assets, choses in action, and books of accounts of the said corporation.

3. And it is further ordered that the said receiver do pass his accounts before this court at such time or times as this court shall hereafter direct.

(Signed) R. B. CARPENTER.
APRIL 22, 1869.

On 28th of April the following grounds of appeal were filed:

IN RE DABNEY, MORGAN & CO.
vs
THE BANK OF THE STATE, BARING BROS. & Co., et al.

Baring Brothers & Company, in behalf of themselves and the other fire-loan bondholders, and Maria Simons, Jane V. Bowley, and Ar-
82 noldus V. Dawson, for themselves and the other holders of the fire-loan stock, being by far the majority in amount of all the creditors of the Bank of the State, and entitled prior to all others to the fund in equity, consisting of the property, assets, and credits of the bank, appeal from the final order in the matter of the appointment of a receiver, on motion in behalf of the debtor only. They will move to set aside said order before the supreme court upon the following

GROUNDS OF APPEAL:

1st. Although it appeared that Charles M. Furman and Thomas R Waring, as president and cashier of the bank, were in the actual possession of the funds at the inception of the suit as trustees for the creditors, and were afterwards, by consent of all parties, so continued by decretal orders on the 3d of March, 1868, the said assets being already "a fund in equity as completely and actually as if in the hands of a receiver;" and although said orders were repeated and confirmed by the decree of Chancellor Carroll on the 30th day of November, 1868, his honor Judge Carpenter, granted the order appointing a receiver without any cause shown by affidavit, and without "reference" or inquiry as to the faithfulness or competence of the parties in possession.

2d. That said order was granted on the motion, not of a creditor, but of a debtor of the bank, (the party sued,) and in opposition to the expressed wishes of a majority of the creditors appearing, opposing the motion.

3d. That there was no pretence of a showing, by affidavit or otherwise, that the parties in possession were "incompetent," or that they "misapplied the fund" or "abused the trust."

4th. That said parties, whether in possession officially or by consent of all creditors, or by appointment of the court, were trustees in possession, and could not be removed without cause shown.

5th. That previous orders, though they concluded nothing, could not be reversed without new matter introduced or cause shown.

6th. That the only ground suggested at the hearing, in argu-
83 ment, for removing the trustees or custodees and appointing a receiver, was the propriety of having security for the fund; and, notwithstanding this, the security required by the order is altogether insufficient in fact and in law, the amount being $30,000 only, while the fund to be received is not less than $500,000.

7th. That the act of 1821, and the uniform practice, establish the law as to the amount of the bond to be required from a receiver appointed in invitum, (against the will of the creditors,) to wit, double the amount of the entire fund entrusted to him, and the bond ordered in this case falls short of the bond required by law more than $800,000. The amount does not pretend to approximate to the amount fixed by law.

8th. That said order is "final" as to the subject-matter; and, if wrong, the mischief, if any arise, is irreparable.

(Signed) HAYNE & SON,
Solicitors for Baring Bros. & Co., Maria Simons, and Jane V. Bowley, Defendants.

(Signed) JAMES B. CAMPBELL,
Of Counsel.

(Signed) THO'S Y. SIMONS,
Solicitor of A. V. Dawson.

On the same day, the following petition was filed on the part of T. R. Waring:

STATE OF SOUTH CAROLINA, *Charleston County:*

IN RE DABNEY MORGAN & CO.
vs.
THE BANK OF THE STATE OF SOUTH CAROLINA,
Baring Bros. & Co., et al.

To the Honorable R. B. Carpenter, judge of the circuit court for said county:

Your petitioner, Thomas R. Waring, respectfully showeth that
84 he is a party to said suit, both as an individual and as cashier of said bank; that, as cashier, he was, at the inception of this suit, in possession of the assets of the bank; that by the decretal orders of March 3d, 1868, he, as cashier, and Charles M. Furman, as president, were enjoined from turning over to any creditors any portion of the assets unless by order of the court. Said order was confirmed and extended by the order of the 30th day of November, 1868.

Your petitioner further shows that, by service of a copy of the order of Judge Carpenter, filed the 22d day of April, 1869, he was notified of the appointment of W'm C. Courtney as receiver, and that your petitioner and Charles M. Furman were required to deliver over to said receiver "the possession of all the real estate, personal property, assets, choses in action, and books of account of the said corporation."

Demand was made by the said receiver for such delivery on the 26th day of April, 1869, and your petitioner has been preparing, with all practicable dispatch, to comply with said order, and expected this day to have completed the delivery required.

Your petitioner, while engaged in complying with said order was served with notice of appeal from the order aforesaid, and it is claimed that such appeal operates as a supersedeas, and suspends said order.

Your petitioner considering himself now, as heretofore, under the control of the court, and subject to its orders, applies to your honor for instruction. Does or does not the appeal operate as a suspension of the previous order?

And your petitioner will ever pray, etc.

(Signed) THO'S R. WARING.

ISAAC HAYNE,
Solicitor for Petitioner.
APRIL 27TH, 1869.

The above petition being heard, the following order was entered by the court:

85 IN RE DABNEY, MORGAN & CO.
vs.
THE BANK OF THE STATE OF SOUTH CAROLINA,
Baring Brothers & Co. et al.

On hearing the petition of Thomas R. Waring, esq., asking the instructions of this court as to the matter of delivering the assets of the Bank of the State of South Carolina into the hands of the receiver, appointed by order of this court, dated April 22d, 1869, pending an appeal from said order—

It is adjudged that the appeal from the said order does not operate as a supersedeas thereof.

And it is further ordered and adjudged that the said Thomas R. Waring do proceed without delay, to comply with the terms of the order of this court of the 22d day of April, 1869.

(Signed) R. B. CARPENTER.

APRIL 28TH, 1869.

On the next day the following order was entered by the court.

DABNEY, MORGAN & CO.,
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK
of the State of South of Carolina, et al.

It appearing that, by an order of this court, dated March 3d, 1868, all holders of the bills or notes of the said Bank of the State of South Carolina, were directed to make proof of said bills or notes before Master James Tupper, and the custody of said bills or notes so proven, have been transferred to Thomas R. Waring, esq., cashier of said bank;

And it further appearing that, by an order of this court, dated November 19th, 1868, the owners of said bills or notes were allowed to withdraw them for the purpose of funding the same, upon surrendering to Thomas R. Waring, esq., the receipt and certificate given them therefor, and upon payment of the costs of suit thereon.

86 And it further appearing that, by an order of this court, dated April 22d, 1869, W'm C. Courtney, esq., has been appointed receiver of all the assets and property of the said bank:

It is therefore ordered, on motion of D. H. Chamberlain, attorney-general, that Thomas R. Waring, esq., have leave to surrender the custody of said bills or notes to W'm C. Courtney, esq., the receiver aforesaid, and that the said receiver do receipt to the said Thomas R. Waring, esq., for all such bills or notes transferred to him, and do relinquish said bills or notes to the owners thereof, upon the conditions and according to the terms of the order of November 19th, 1868, hereinbefore referred to.

(Signed) R. B. CARPENTER.

CHARLESTON, S. C., *April 29th*, 1869.

On the 10th July, the following order was entered:

IN RE DABNEY, MORGAN & CO.
vs
THE PRESIDENT AND DIRECTORS OF THE BANK
of the State of South Carolina, et al.

On motion of Hayne & Son, solicitors, it is ordered that Ja's W. Gray, special referee, have leave to file so much of the report as he has

prepared under the order of reference, made in this cause on the 20th March, 1869, and that the said referee have leave to hold further references, and complete said report under the aforesaid order by the next term of this court in November, 1869.

(Signed) R. B. CARPENTER.

JULY 10, 1869.

In accordance with this order various references have been held, and testimony taken since the filing of the partial report.

At different times the scrip was produced, and the following stock proved:

87 FIRE-LOAN STOCK.

Scrip No. 632, J. D. Kracke	$1,112 00
698, Hayne & Son	800 00
699, Isaac Hayne	500 00
702, Isaac Hayne	229 26
619, Mrs. Catherine O. Barnwell	2,957 00
Geo. W. Williams	5,000 00
Geo. W. Williams & Co	4,634 00
South Carolina Loan and Trust Co.	5,000 00
Mrs. Jane V. Bowley, ex'x	34,533 34
Maria Simons	41,790 00
Add stock proved before Master Tupper, contained in Exhibit C, Part 1	21,116 94
And stock sworn to in answer of A. V. Dawson	37,000 00
Total	$154,672 54

FIRE-LOAN BONDS.

The following fire-loan bonds were proved before me by W. B. Williams, viz:

3 bonds of £1,000 each	£3,000
3 bonds of £500 each	1,500
	£4,500

At a reference the day of November, the commission to take testimony in London, England, returned to the clerk of the court some time since, was produced, and by consent of solicitors, including the attorney-general, was opened in my presence. The following bonds were found to have been duly proved by Baring Brothers & Co., holding the same either in their own right or as agents of the owners, viz:

24 bonds of £1,000 each	£24,000
156 bonds of £500 each	78,000
	£102,000
This, with the £4,500 above, makes of sterling fire-loan bonds proved,	£106,500

88 Mr. Thomas R. Waring, late cashier of the bank of the State, was sworn and examined in my presence. The examination-in chief had been prepared by written interrogatories and answers. The cross-interrogatories and reply were carefully reduced to writing at the time. I embody in my report the whole of the testimony, including tabular statements and list of assets. The elaborate list of the present

holders of bank bills, who have made themselves parties to the suit, is appended to the report marked as Exhibit X.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE Bank of the State of South Carolina, et al. } In equity.

Interrogatories propounded to Tho's R. Waring.

1. What is your age and occupation?

2. When did your connection with the Bank of the State of South Carolina begin, and in what capacity? When were you made cashier? As such, were you the custodian of its assets and cognizant of its business transactions?

3. When did you deliver over the property and assets of the bank to W'm C. Courtney, esq., under order of the court in this case?

4. Does the receipt given you by Mr. Courtney, give in detail all the property and assets of the bank at that date?

5. Produce and leave with the referee a copy of that receipt; mark on said copy such assets as are held not absolutely, but as collateral security. Designate the particular debt for which each collateral is held, and state as to each whether the original debt is past due or condition broken.

6. State, as nearly as you can, your estimate, in the aggregate, of the present value of the property and assets turned over,
89 exclusive of the choses in action in hands of attorneys for collection.

7. You have read the act of incorporation of 1812, and the various acts increasing the capital of the bank since. State whether any portion of the capital of the bank contributed by the State now exists in specie, that is, in the form in which it was given by the State to the bank.

8. Has not everything furnished as capital, without exception, changed its form?

9. Has the bank ever accounted to the State for the amount of capital advanced? Has not every dollar of the amount of the capital furnished been refunded to the State withse ven per cent. interest? Do you know of any account rendered to the legislature showing this fact? When and by whom was the account rendered?

10. The State then had, at that time, been repaid all the capital advanced, and was in debt to the bank.

11. What was the amount of the balance then due by the State to the bank? Was not this amount due in gold or its equivalent in December, 18—?

12. Was not this balance greatly increased subsequently? How does the account now stand?

13. Does this amount include, to some extent, confederate money?

14. Are you able to give some approximate estimate of the amount of this indebtedness of the State to the bank in United States currency, taking it as of this date?

15. If the State has received back again the capital advanced, out of what fund have the assets now held been paid for? Are these assets the result of the profits of the bank?

16. Explain the "sinking-fund." Did not the sinking-fund consist of the result of profits? Do you or not know that the assets of the bank, other than unpaid notes discounted, were purchased by the result of

"profits" of the bank? Were any of these assets purchased prior to 1838; and if any, to what extent?

17. You know the amount of the fire-loan bonds and stock.
90 Have the profits of the bank since 1838, exceeded the aggregate value of its present property and assets? If the profits had been strictly set apart as directed by the act of 1838, without any portion having been withdrawn for other purposes, would not the fund accumulated have greatly exceeded the fire-loan debt?

18. The stocks for which the original capital of $1,500,000 was pledged, included six-per-cent. stock provided for in the act of 18 , and that provided for in the act of , and some have supposed the three-per-cent. stock provided for in act of . Omitting the three-per-cents. $38,000 of which is still unpaid, has not all the rest been paid? Was the six-per-cent. stock paid by the bank; and if so, from what fund? When was the last of said stock paid? Had not the "sinking-fund" for some years previous to last payment accumulated to an amount exceeding the amount of these six-per-cent. stocks for which it stood pledged?

19. Were you employed by James Tupper, esq., master, to count the bills of the bank of the State proved before the master in this case? What was the aggregate amount? How much was of the issue prior to January, 1861, and how much of the issue subsequent? Have any of these bills been withdrawn by parties presenting them, and what amount?

20. Do you know the amount undrawn still claiming payment out of the funds in this case?

21. Produce the scrip in your hands belonging to Maria Simons and Jane V. Bowley. Are these the certificates of stock described in the respective answers of these parties in this suit?

22. When did this scrip come first into your possession? Did you send it away, and recently obtain it again?

23. The scrip is all signed by , and contersigned by , and the following on its face.

Answers to interrogatories propounded to Tho's R. Waring.

1. My age is 50; occupation, cashier of the S. C. Loan and Trust Company.

91 2. My connection with the bank of the State commenced in 1838, as clerk. I was made cashier in 1850, and as such had charge of its assets and a general supervision of its business.

3. I delivered the property and assets of the bank to W'm C. Courtney, receiver, on 1st May, 1869.

4. Mr. Courtney's receipts furnished in detail the property and assets.

5. I produce copies of said receipts, and mark "collateral" such as are so held. The stock of the Charlotte and S. C. Railroad Co. is collateral for advances made to the State for subscription to the said road, and the stock of the State of South Carolina is collateral for advances made for the construction of the new State-house. These debts, still unpaid, stand on the books of the bank as advances to the State, and exceed in amount the value of the collaterals.

6. I think the property and assets turned over to Mr. Courtney, exclusive of choses in action, in attorneys' hands for collection, would bring in the market nearly $767,000.

7 and 8. Everything contributed by the State to the capital of the bank, as far as my knowledge extends, has been changed in form.

9. By a statement of the comptroller-general to the senate, published in December, 1848, of all funds received by the bank of the State for capital, with interest thereon at the rate of 7 per cent., and also of all payments made by the bank on account of the State, at the same rate of interest, and of a statement in continuation by the president of the bank brought up to 1st October, 1866, it appears that the bank has accounted to the State for capital advanced from all sources.

10 and 11. The State had, at the time the last statement was published, been refunded, by these payments of the public debt and interest, all the capital advanced, with interest at 7 per cent., and $150,919.99 in excess, exclusive of interest on this excess amounting to $20,468.25.

12. The bank had ceased to do business before the date of the last statement referred to in 1866, but there were advances made previously
92 to the State not included in the statement, which would further increase the excess of payments on account of the State over and above the capital and interest.

13. Some of these payments made during the war included, to some extent, confederate money.

14. I am unable to give any value in present currency for these advances which were made at various times during the war.

15. The assets of the bank delivered to Mr. Courtney, or nearly all of them, I have always considered as investments from profits at credit of the sinking fund.

16. The sinking fund is the result of the profits of the bank passed annually to the credit of that account, and it was from this fund these investments were made, as I have stated above, of which only $5,000 appears by the books to have been held prior to 1838 in South Carolina railroad stock.

17. The original amount of the fire-loan was $2,000,000; the amount now outstanding, exclusive of interest, is £109,000, payable in London, and about $318,000, payable in this State. The profits of the bank since 1838 undoubtedly have exceeded the value of its present property and assets, and if set apart and applied as directed by act of 1838, the fund accumulated would have greatly exceeded the present fire-loan debt.

18. The stocks for which the capital and profits were pledged prior to 1838, and the redemption of which were charged upon the bank, have all been paid. I am not prepared to say how far the assets of the bank are liable for the redemption of the three-per-cents, if at all. The six-per-cent. stock was paid by the bank and from the sinking-fund. I have no means of ascertaining the date of the last payment.

19. I was employed by James Tupper, master in equity, to count the bills proved before him in this case. The whole amount proved was as follows:

93 Dated previous to 1861	$906,951 00
" since 1860	313,731 00
Fractional currency	32,310 10
	$1,252,992 10
These notes were left in my custody by Mr. Tupper. Since his death there has been withdrawn by the holders	$1,065,237 40
Leaving still in my custody	$187,754 70

The amount remaining in my custody as above, and still claiming payment out of the funds in this case, is $187,754.70. Of this $35,463

are of the issue prior to the war, and $152,291.70 are of the issue since 1st January, 1861.

21, 22, and 23. The certificates of State stock which I now produce, belonging to Maria Simons and Jane V. Bowley, are the same described in the respective answers of these parties in this suit. They were in my keeping for these ladies several years previous to the suit, and were sent them in August, 1868, and subsequently returned to me by them. The scrip is all signed by the treasurer of the State of South Carolina, and countersigned by the president of the Bank of the State of South Carolina, and the following on its face: "Loan under an act for rebuilding the city of Charleston."

In addition to the copy of Mr. Courtney's receipt, I present two statements showing the profits of the bank each year from 1838 to 1865, and how applied.

From these statements it appears that the net profits up to October, 1860, aggregated $5,881,056, of which $2,979,168 went to the sinking-fund, $2,094,223 went to payment of interest on fire-loan debt, $259,948 was lost by bad debts; $547,715 was applied under various acts of the legislature to other purposes. The misapplication for the next four years amounts, as per statement, $171,966.

THO'S R. WARING.

94 *Receipt of W'm C. Courtney, receiver.*

In the common pleas, Charleston County, on the equity side.

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina.

Motion for appointment of a receiver.

1. On motion of D. H. Chamberlain, attorney-general, W'm C. Courtney is hereby appointed to be receiver of all the assets and property whatsoever of the corporation known as the President and Directors of the Bank of the State of South Carolina, upon his filing in this court his bond in the sum of thirty thousand dollars, with sureties to be approved by this court, to duly hold, keep, account for, and pay the said assets and property under and according to the order and decrees hereafter made by this court.

2. And it is ordered that the defendants, Charles M. Furman and Thomas R. Waring, do deliver over, without delay, to W'm C. Courtney, the receiver hereinbefore appointed, the possession of all the real-estate, personal property, assets, choses in action, and books of account of the said corporation.

3. And it is further ordered, that the said receiver do pass his accounts before this court at such time or times as this court shall hereafter direct.

[SEAL.] (Signed) R. B. CARPENTER.

APRIL 22d, 1869.

I hereby certify that the foregoing is a true copy of the order of Judge Carpenter in this cause.

Witness my hand and seal this 22d April, 1869.

(Signed) A. C. RICHMOND,
C. C. C. P. Charleston County.

95 Received of Thomas R. Waring, named in the above order, the

following real estate, personal property, assets, choses in action, and books of account of the corporation known as The President and Directors of the Bank of the State of South Carolina, the said C. M. Furman, also named therein, being absent:

REAL ESTATE.

Lot and banking-house, corner of Broad and State streets, and building in the rear.

Banking-house and lot in the city of Columbia.

Banking-house and lot in the town of Camden.

Banking-house and lot in the town of Abbeville.

Tenement-building, corner of East-Bay and Fraser's wharf, and the four stores and shed in the rear.

Title cannot be found. Afterwards found. W. C. C., receiver.

Same conveyance; lot and brick building on west side of East-Bay, (from est. T. Ryan.)

Four lots in Elliot street, (from est. T. Ryan.)

Lot and building corner Elliot street and Gadsden's alley.

House and lot in Doughty street.

April 28th, 1869.—Received the above titles, with the exception of buildings East-Bay and Fraser's wharf.

W. C. COURTNEY, *Receiver.*

I am informed there is a tract of land in Sumter claimed by W. B. Councell, the title to the same being in the bank. I am also informed that there is a small tract in Spartanburg; title appearing in the name of the bank.

BONDS AND STOCKS OF INCORPORATED COMPANIES AND OF THE STATE OWNED BY THE BANK OF THE STATE OF SOUTH CAROLINA.

Bonds of the State of South Carolina—issue, 1866:

10 bonds of $1,000	$10,000
5 bonds of $500	2,500

With coupons attached of, and from, 1st January, 1868.

W. C. COURTNEY, *Receiver.*

96 Bonds of Wilmington and Manchester Railroad Co., and certificates of indebtedness:

122 bonds of $1,000	$122,000
31 bonds of $500	15,500
1 certificate of indebtedness	375
	$137,875

With coupons attached of, and from, 1st January, 1868.

W. C. COURTNEY, *Receiver.*

Bonds of Greenville and Columbia Railroad Co., and certificates of indebtedness:

100 bonds of $500	$50,000 00
32 certificates of indebtedness of $500 each	16,000 00
3 certificates of indebtedness of $100 each	300 00
1 certificate of indebtedness	84 75
	$66,384 75

With coupons attached of, and from, 1st July, 1868.

W. C. COURTNEY, *Receiver.*

Bonds of Laurens Railroad Co.:

77 bonds of $500 each $38,500

With coupons attached of, and from, 1st January, 1*st*, 1861, on 50 bonds, and from 1st July, 1863, on 26 bonds—one bond past due.

W. C. COURTNEY, *Receiver.*

Bonds of Louisville, Cincinnati and Charleston Railroad Co.:

14 bonds of £500 each, at $4.44 to the £..... $31,111 11

With warrant of 1st January and 1st July, 1865, and 1st January, 1866.

W. C. COURTNEY, *Receiver.*

Bonds of South Carolina Railroad Co., 7 per cent.—issue of 1866:

228 bonds of $500 each..... $114,000

With coupons attached of, and from, 1st October, 1869.

W. C. COURTNEY, *Receiver.*

97 Sterling bonds of the South Carolina Railroad Co. list furnished by Baring Brothers & Co.:

Of bonds in their hands.....	£31,200
1 bond delivered here, with coupons of and from 1st January 1867.....	600
1 certificate of indebtedness.....	50
	£31,850

Received Baring Bro's & Co.'s letter, acknowledging possession of these bonds. Letter dated 1st June, 1867; letter dated 3d April, 1869.

W. C. COURTNEY, *Receiver.*

1 certificate of indebtedness Charlotte and South Carolina Railroad.....		$752 50
1 bond of.....	$500 00	
Without coupons of and from 1st January, 1868, and 1 certificate for.....	313 95	
	813 95	
Cost.....	752 50	

W. C. COURTNEY, *Receiver.*

Stock of Charlotte and South Carolina Railroad Co.:

2,704 shares held in name of the bank as security for advances for subscription of the State to said company.

April 28th, 1869.—Received the above securities.

W. C. COURTNEY, *Receiver.*

Confederate States 4-per-cent. bonds.....	$11,400
Confederate States 6-per-cent. bonds.....	60,500
Confederate States 7-per-cent. bonds and stock	867,000
Confederate States 8-per-cent. bonds and stock.....	2,673,400
Confederate States 4-per-cent call-loan.....	1,222,300

Confederate States 8-per-cent specie-loan..... 18,000
$6,000 4-per-cent. burnt in Camden
200,000 8-per-cent. sent to Beach, Root & Co., Liverpool.
432,700 excess of the 4-per-cent. call-loan.
W. C. COURTNEY, *Receiver.*

98 Received 1st May, 1869, the acceptance of Ja's R. Pringle of S. H. Deas' draft, dated February 20, 1869, payable December 1st—4th, 1869, for one thousand dollars, taken by the bank in settlement of the note of T. J. Ancrum, endorsed by Kennedy, $, in Camden Branch. Also Mr. Shannon's letter advising the settlement.
W. C. COURTNEY, *Receiver.*

Stock of South Carolina Railroad Company:		
1,799 whole shares, with corresponding shares in the S. W. R. R. Bank, par 125.....	$224,875 00	
1,799 half shares in road at 50.....	89,950	314,825 00
Shares Northeastern Railroad Company:		
600 shares at 50.....		30,000 00
Shares in Savanah and Charleston Railroad Company:		
350 at 100.....		35,000 00
Stock Commercial Bank:		
16 shares.....		400 00
Coupons.		
From bonds of Spartanburg and Union Railroad Company.....		6,142 50
From bonds of State of South Carolina, war issue.....		286 24
From bonds of State of Georgia, war issue.....		87 50
From bonds of Charleston and Savannah Railroad Company.....		880 25
Stock of State of South Carolina:		
Six per cent., held in name of the bank as security for advance to the State for the new state-house.....		121,300 00

W. C. COURTNEY, *Receiver.*

The receipts for personal bonds and notes discounted, in the hands of lawyers for collection is omitted. More accurate information as to these can be obtained from the receiver.

99 *Second day of examination of Tho's R. Waring.*

The bank has paid out for the use of the State more than it has ever received from the State. On the 1st October, 1866, the State was indebted to the bank $150,919.99 with interest. This includes amount received from the bank on account of the fire-loan, from the surplus revenue, and all other sources. This includes all funds received by the Bank of the State of South Carolina, with interest at 7 per cent. and also all payments made by the bank on account of the State, with interest at the same rate.

Cross-examined:

When the fire-loan was paid into the bank, no separate account was kept of the profits arising from the fire-loan. Upon asking Mr. Furman the reason why the requirements of the act in this respect were not complied with, he assigned that this would have involved great labor and expense, and would have necessitated almost the carrying on of two banks.

The debt, for which the profits were previously pledged, had been redeemed, the funds being sufficient, and, therefore, no separate account was kept. These debts were loans which were charged upon the profits of the bank by act of the legislature; do not remember their amount, but all have been paid off; am not able to state what were the profits of the bank to 1838. All of the debts charged upon the bank were, by acts of the assembly, subsequent to its charter.

There was no separation either of capital or profits in the account kept by the bank of the fire-loan. The sinking-fund was originally opened by the bank out of its profits, for the purpose of redeeming the debts originally charged upon the bank, and also afterwards, including the fire-loan debt. The annual profits of the bank, after payment of expenses and interest on the fire-loan, was carried to the sinking-fund. The sinking-fund was a fund, showing the net profit of the bank, and is the result of the profits of the bank. The securities in the hands of Mr. Courtney, the receiver in this case, I consider as investments
100 of the profits as a sinking-fund. I consider these assets as profits and not as capital, as I have always so understood from those having the management of the bank. They were considered as representing profits invested for the sinking-fund. I would scarcely think a bank would invest its capital in permanent securities. It might temporarily. It would be apt to use its capital in its ordinary business.

If it had a large amount of its capital lying idle, it might invest temporarily, but scarcely permanently. The Bank of the State, to some extent, did bank upon a portion of its profits, as well as upon its capital; cannot say to what extent or whether there was any fixed limitation.

Question. "If a man embarked in business with a capital of $100,000, and he has made at the end of the first year $10,000, before the end of the second year he becomes ruined in business, and has but $10,000, would you consider that $10,000 as profits, or as all that was left of his capital?"

Answer. "I should suppose if he had lost his $100,000, that he would have lost his capital. The $10,000 would represent profits."

Question. "Can there be such a thing as profits when the capital has been lost and the bank insolvent?"

Answer. "I cannot imagine what else the investments that remain to the bank can be but profits."

Question. "Can a man be said to have made $10,000 when his capital is lost, and he is a bankrupt?"

Answer. "If he had made $10,000, and set that apart or invested it from the profits, it would represent profits."

Question. "If a man should choose to enter all the profits of his transactions in one account, without any regard to the losses he had made, would you say that account represents his profits?"

Answer. "I would say that that account did not represent a true statement of his profits, because he had taken no account of his losses. A statement so made would show gross and not net profits?"

Question. "In ascertaining the true condition of a concern, should regard be had to gross or net profits?"

101 Answer. "I should say to net profits."

Question. "In closing up the affairs of an institution or individual, should the balance show gross or net profits?"

Answer. "The balance-sheet, at the end of each year, should show net profits after expenses and losses."

Question. "Can there be such a thing as net profits now, when the capital is gone and the bank insolvent, as, for instance, in 1866."

Answer. "I should think the profits set aside and invested must be so regarded."

Question. "Do you mean that these profits could be paid out to anybody except to the debts of the bank?"

Answer. "I should think that the bank could apply them to the debts for which they were specifically pledged."

Question. "Is not the correct mode of closing the affairs of a corporation or individual that the assets should first be applied to the debts then to the capital?"

Answer. "I should suppose the debts would be paid, and then if anything was left, to the stockholders or parties."

Question. "Are not net profits, then, that which remains after thepayment of the debts, and then the capital?"

Answer. "I should think so in winding up. The statement marked 'No. 1' shows the net profits of the bank at the end of each fiscal year. In this statement the net profits, after deducting expenses, are set out; then the bad debts and the interest on the fire-loan; the difference is carried to the sinking-fund or to special appropriations. The interest of the fire-loan was specially pledged against the profits, and this is therefore first deducted, together with the expenses and the bad debts, before the balance is carried to the sinking-fund as profits."

Question. "What induces you to regard the investments in the hands of the receiver as investments from the profits?"

Answer. "I have always so understood. The accounts of each year were generally made up about the 1st October. There was no special account kept of investments in trust for the sinking fund. I cannot trace the precise investments. All my information is derived from Mr.
102 Furman, the president. So far as I know, there is no book or account in the bank which shows how the surplus fund each year was invested."

Question. "In what class of bills were the loans to the confederate government made?"

Answer. "To the best of my recollection the bulk of the subscription was in bills of the bank of old issue. I know we had to sign some new bills to make up the amount At the early part of the year change was scarce. Most of the new issue was in 1861. That of 1862 was chiefly in $1 and $2 bills, for convenience. Besides this, there was fractional currency issued as late as 1864.

Cross-examined in reply:

The only way in which the bank varied from the directions contained in the 11th and 12th sections of A. A. 1838, consisted in keeping but one set of books, and one account of profits in regard to both the additional capital of $2,000,000 and the original capital of $1,500,000.

Statement No. 1 is the result and summary of the accounts thus kept. There are no books prior to 1862. This result is made up from the published annual reports of the president of the bank to the legislature. The first column gives the end of each fiscal year. It begins on October 1st, 1839, and ends on October 1st, 1860, and shows the statement of each previous year, ending on September 30th. The second column, under the head of "net profits," gives the profits after deducting current expenses, but without any deduction for losses. The third column gives for each year the profit and loss accounts representing bad debts. The fourth column gives the amount of interest paid upon the fire-loan debt for each year, the bank considering the profits specially dedicated to the payment of that interest. The fifth column gives a list of amounts from time to time appropriated by the legislature out of the profits

of the year to other purposes. The sixth column gives the amount of profits passed each year to the credit of the sinking-fund.

Statement No. 2 is made out in the same way, continuous of the former statement, and up to October 1st, 1864.

(Signed) THO'S R. WARING.

103 The order of reference passed on the 20th March last, copied in part 1 of my report in this cause, and continued by the order of 16th July last, copied above, requires that I should "report a scheme for the sale and distribution of the fund in controversy among the creditors and claimants thereof."

I recommend as a scheme for the sale of the real estate, that W'm C. Courtney, receiver, sell the same at public or private sale, at his discretion, subject to the approval of the court, at any time between the date of this order and the day of March, 1870; the terms to be one-third cash and the residue in one, two, and three years, with interest at the rate of seven per cent. per annum, payable semi-annually, the credit portion to be secured by mortgage of the premises, and the buildings to be insured and kept insured by the purchaser, and the policies of insurance to be assigned to said receiver. And that the said W'm C. Courtney be appointed special commissioner, with full power to make title to the premises sold as aforesaid. Purchasers to pay for papers and stamps.

As to the stocks, bonds, unsatisfied judgments, mortgage notes and all other securities and choses in action, the property of "The President and Directors of the Bank of the State of South Carolina;" placed in the hands of said receiver by order of the court, I recommend that the said William C. Courtney, receiver, be authorized and required to sell the same at public auction, to the highest bidder, at Charleston, on the day of April next, and as many days following as may be necessary to complete said sale, after sixty days previous notice in two or more of the daily papers in Charleston, and in one or more papers in Columbia, Savannah, (Ga.,) Augusta, (Ga.,) and New York City. And that the proceeds of said sale, immediately upon the receipt thereof, be deposited in

subject to the order of said receiver, countersigned by the judge of this circuit.

As to the "distribution" of the proceeds of such sale "among the creditors and claimants thereof," it involves the decisions of legal questions which embrace the very points at issue between the parties to the suit, upon which I am reluctant to express an opinion. I have, therefore, with the consent of the solicitors present, made no report upon this subject, and respectfully ask to be discharged from the further consideration thereof.

Respectfully submitted.

J. W. GRAY,
Special Referee.

CHARLESTON, S. C., *Nov.*, 1869.

104 *Testimony of C. M. Furman, esq.*

1st. My age is seventy-two. I am engaged in planting.

2d. My engagement with the bank of the State commenced in 1832. I was then elected cashier. I had been previously a director, and was subsequently president of the bank.

3d, 4th, 5th, and 6th questions are particularly addressed to Mr. Waring, and I refer to his answers.

Answer. "I should think the profits set aside and invested must be so regarded."

Question. "Do you mean that these profits could be paid out to anybody except to the debts of the bank?"

Answer. "I should think that the bank could apply them to the debts for which they were specifically pledged."

Question. "Is not the correct mode of closing the affairs of a corporation or individual that the assets should first be applied to the debts then to the capital?"

Answer. "I should suppose the debts would be paid, and then if anything was left, to the stockholders or parties."

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2d. My engagement with the bank of the State commenced in 1832. I was then elected cashier. I had been previously a director, and was subsequently president of the bank.

3d, 4th, 5th, and 6th questions are particularly addressed to Mr. Waring, and I refer to his answers.

7th. None of the capital of the bank contributed by the State now exists in specie, and none of the original capital has for more than thirty years.

8th. It has.

9th. I refer to the answer of Mr. Waring, which I believe to be correct.

10th and 11th. I again refer to Mr. Waring's answer. I have looked at the statements he refers to. I believe that they are correct. I have no doubt from my recollection, that the statement is correct, that the State has been refunded for all capital advanced with interest at 7 per cent., by the payments the bank has made on the public debt, and on account of the State, i. e., charging the bank with the funds paid to it and interest, and crediting it with payments and interest.

12th, 13th, 14th, 15th, 16th, 17th. I refer to Mr. Waring's answers, which I believe to be correct. My recollection as to the $5,000 invested in South Carolina Railroad stock is not distinct enough to enable me to make a statement respecting it especially, but Mr. Waring has no doubt ascertained the fact.

18th. In the aggregate of funds transferred to the bank as capital, which at one time reached 1,500,000 or thereabout, was included some United States six-per-cent. stock held by the State. The capital thus formed was charged with the payment of the outstanding State six-per-cents (revolutionary debt.) The debt being payable out of the capital, the 6-per-cents fell due, and were finally paid off, I think about the year 1818. The 3-per-cents were not redeemable but at the pleasure of the State. The bank was directed to purchase them at certain rates. When purchased they were transferred to the State by
105 the bank, which thus obtained a credit on account of capital. It was by these payments on 6 and 3 per cent. stocks that the bank capital was reduced from $1,500,000 to $1,156,000. The payments were thus made out of the bank capital. When the 6-per-cents of the revolutionary debt were paid off, what is now termed the sinking-fund had no existence. Up to the year 1819 all the annual profits of the bank were paid into the State treasury. In the year 1818, or about that time, the State pledged itself to the expenditure of $1,000,000 for internal improvements. In order to provide funds for this expenditure, the State authorized the issue of $800,000 of six-per-cent. stock; again, in 1822, it authorized the issue of $200,000 of five-per-cent. stock, and, in 1824, it issued another five per cent. stock for $250,000, making an aggregate of $1,250,000. In 1820 or 1821, the State directed that the annual profits of the bank should no longer be paid into the State treasury as a part of its annual income, but that it should be set apart as a fund for the payment of the interest and the redemption of the principal of the debt of $800,000. The five-per-cents were also in like manner charged on the fund. In 1825 an additional 5-per-cent. stock to the amount of $300,000 was issued. The interest on these stocks were all paid from the sinking-fund till the principal became due. These stocks were redeemable each at the expiration of twenty years from the date of issue, and the $800,000, the $200,000 and the $250,000 were each taken up at maturity. As to the $300, a further explanation is necessary, which I proceed to make. In the year 183–, the United States deposited with the State a portion of its surplus revenue, $. This sum was placed in bank, and I think under its control. The State about the same time subscribed for 10,000 shares in the Louisville, Cincinnati and Charleston Railroad Company, at $100 each, and charged the bank with the payment of the instalments to be paid on the stock out of the

surplus revenue. Subsequently the State subscription was reduced to 8,000 shares. The bank paid the instalments on the 8,000 shares. This left the balance of the surplus revenue, undisposed of, something over $200,000. The bank then proposed that said amount should
106 be transferred to the bank in consideration that it would pay off the $300,000 of stock issued in 1825. The arrangement was made and carried into effect.

To the 19th, 20th, 21st, 22d, and 23d questions, I refer to Mr. Waring's answers, these matters not coming within my knowledge.

I have no doubt that the bank paid out for the use of the State more than it received as represented in the account referred to in Mr. Waring's answers. I have looked at the statement—I may say I have verified it, and do not doubt its correctness. I refer to the statement itself. There was no separate account kept of the profits of the fire-loan. This course was adopted in part on account of the inconvenience and expense attendant upon keeping separate accounts, and also on account of its being comparatively immaterial to do so. To explain: The fire-loan came into bank in or about the year 1840. From the year 1820 the bank had paid the interest on the State debt. From 1823 the amount of debt on which the bank paid interest was $1,555,000, very much exceeding the bank capital. In 1840 the 6-per-cents became due—$800,000—and the bank paid them off. The other State debts soon become due, and were paid off at maturity, in all $1,300,000. All the profits of the bank were set apart as a provision for the payment of the principal and interest of the fire-loan, after the debts above referred to were discharged. Under the circumstances it was considered unnecessary to keep separate accounts.

If the bank has made certain profits, which have been set aside for certain purposes, a subsequent loss of capital would not alter the character of profits already declared. I concur in the replies made by Mr. Waring to the cross-interrogatories generally. As the books of the bank were destroyed during the war, the published accounts are our chief reliance for information respecting the operations of the bank.

107 THE STATE OF SOUTH CAROLINA,
Charleston County, ss:

Court of common pleas. In equity.

DABNEY, MORGAN & COMPANY,
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina, Baring Brothers & Company, et al.

Decree.

Before Judge Carpenter:

The bill in this case was filed by Messrs. Magrath & Lowndes, solicitors for Dabney, Morgan & Co., on the 30th day of October, 1867, in the court of equity of this State, under the laws then existing.

The bill sets forth in substance the charter of the Bank of the State of South Carolina, adopted by the legislature of South Carolina, in the year 1812; the election by the legislature of the president and directors of the bank so created; and the acceptance by them of the charter; the supply of capital by the State, and the fact of

the issuance, from time to time, of notes or bills of the bank, redeemable in specie. It sets forth that the bank is insolvent, and claims in the alternative—first, that the capital and all the assets and property of the bank are primarily liable to the holders of the bills issued, and that these billholders are entitled to payment in full before the claims of other creditors can be considered; or, failing in this, secondly, that billholders are entitled to share the assets or property of the bank, pari passu, with other creditors. It refers to the act of 1838, for rebuilding the city of Charleston, and recites the 10th, 11th, and 12th sections of said act. The bill further charges that the two milions of dollars added to the capital of the bank by the loan effected under the act of 1838, are subject to the same conditions with the original capital. It denies that the holders of the fire-loan bonds and stock are properly creditors of the bank at all, under the act of 1838, or if they be creditors, that they are entitled to any preference over other creditors, and, least of all, to any preference over billholders. It further charges that the 11th section of the act of 1865, directing that the assets of the bank be held "especially appropriated—first, to the principal and interest of the bonds known as the fire-loan bonds, payable in Europe; second, to the payment of the principal and interest of the fire-loan bonds, payable in the United States; and, third, to the redemption of the outstanding notes hitherto issued by said bank," is unconstitutional and void—first, as impairing the obligation of the contract raised by the charter of 1812; second, as violating the bankrupt act passed by Congress in 1807. The bill then prays that the "president and directors of the bank," as a corporation, and Charles M. Furman and Thomas R. Waring, as individuals, answer the premises, and that they account for the capital, assets, and property in their possession; and it further prays that the court, take possession of said capital, assets, and property and distribute the same among the creditors, but claiming priority in such distribution for the billholders.

On the 3d day of February, 1868, The President and Directors of the Bank of the State of South Carolina, by their solicitors, Hayne & Son, filed their answer to the bill.

108 The answer admits of the adoption of the charter of 1812, its acceptance, the receipt of the original capital from the State by the bank, and the issuance by it, from time to time, of bills or notes, made payable in gold or silver coin, and that the holders of the bills are creditors. The answer denies that the billholders are preferred creditors, or that the present holders of the bills issued received such bills "as money," or "in the expectation or hope that they would be paid in coin;" but it alleges that these bills or notes were bought on speculation, and after the insolvency of the bank, and with a full knowledge of this insolvency. The answer further alleges that, (if the bank be insolvent, as alleged by complainants, and the assets insufficient to pay all indebtedness,) when said assets are to be distributed by the court of equity, the billholders, as creditors, can rightfully claim only in proportion to the amount actually paid for the bills. The answer further alleges, that the billholders, as well as other general creditors, are, in fact, postponed to the two first-named classes of creditors, to whom preference was given by the act of 1865. It claims that a lien was created by the act of 1838, in favor of these classes; but that, even if the "pledges," contained in the act of 1838 do not constitute a "lien," giving them a priority to the exclusion of other creditors, that act certainly constitutes these classes, to wit: the fire-loan bondholders in Europe, and the fire-loan stockholders in America, "creditors" of the bank. The answer refers to the endorsement on the bonds by the president of the bank, guaranteeing, in

the name of the bank, the payment of principal and interest, in proof that these preferred classes were creditors, and creditors having peculiarly strong claims both on the State and on the bank. The answer further alleges, that the bondholders and stockholders being bona-fide creditors, the bank was, under the then existing laws, authorized at its discretion, to assign its effects for the benefit of creditors, giving a preference to these creditors over others, and that the act of 1865, adopted by the bank and accepted by the preferred creditors constituted an assignment by the bank; that such preferences impair no contract, and being consummated before the passage of the bankrupt act by Congress,
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On the 25th day of February, 1868, a petition was filed by Hayne & Son, solicitors in behalf of Baring Brothers & Co., of London, England, praying that they be admitted as parties defendant, and it was so ordered.

On the 3d day of March, 1868, at the February term of the court of equity, certain decretal orders were adopted by consent of all the parties then before the court, as well as by consent of the solicitors for the fire-loan bondholders, the solicitors for the fire-loan stockholders, and the attorney-general of the State. By these orders the bill was amended so as to make the attorney-general a party defendant, for the purpose of sustaining the validity of the act of 1865, and to make Baring Brothers & Company defendants in behalf of the fire-loan sterling bondholders, and A. V. Dawson and others, defendants, representing the six-per-cent. fire-loan stock in America. It also required the master of the court of equity to call in, by advertisement, all persons claiming to be creditors by reason of holding bills or notes of the bank, on or before the first day of June, 1868; also to notify all persons claiming to be creditors of the bank by reason of holding fire-loan stock, to make proof of the same within the same period—that is, before the 1st of June, 1868. An injunction was granted by these orders restraining creditors of all classes from sueing the corporation except as parties to these proceedings, and restraining the bank and its president and cashier from paying over assets to preferred creditors, without prejudice, however, to
110 the right of the corporation to collect debts, and to change the form of the assets in possession.

On the 3d of April, 1868, the attorney-general filed his answer, which vindicated the act of 1865, preferring certain creditors, and claimed that the act of 1865 was confirmatory of the act of 1838, known as the fire-loan act.

On the 15th of April, 1868, Maria Simons and another, in behalf of themselves and all others holding fire-loan stock, and on the 20th of May, 1868, A. V. Dawson, filed their respective answers, both of which claimed under the acts of 1838 and 1865.

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was filed. From their answer I copy the following statements, which seem to me necessary to a full understanding of the case:

"In the month of April, in the year 1838, the larger part of the business portion of the city of Charleston was destroyed by fire. Trade was prostrate, and thousands of the inhabitants were without shelter. Such was the extent of the calamity that the general assembly of South Carolina had been called together by the governor, and had duly created and ratified on the 1st day of June, 1838, an act entitled 'An act for rebuilding the city of Charleston.' This act authorized the issue of the bonds referred to, for the sum of two millions of dollars, thereafter known as the 'fire-loan bonds,' and hereinafter more particularly described. The funds thereby to be raised were, by the scheme of the act, to be placed in charge of The President and Directors of the Bank of the State of South Carolina, to be used by them for the purpose of rebuilding the city of Charleston. The act also provided for the appointment by the said The President and Directors of the Bank of the State of South Carolina, of an agent to be commissioned by the governer, to proceed to Europe to negotiate said loan.' Under this provision, Mr. McDuffie, a distinguished and favorite citizen of the State, lately governor, and for many years a leading representative of South Carolina in the American Congress, was appointed and accredited."

* * * * * *

111 "These bonds, known as 'fire-loan bonds,' were of the form following, signed by the governor of the State, to wit:

"'UNITED STATES OF AMERICA,
"'*State of South Carolina:*

"'£1,000 / "'or / "'£500 } Stg. *Loan under an act for rebuilding the city of Charleston,* £1,000 / or / £500 } Stg.

FIVE-PER-CENT. STOCK.

"'No.

"'By his excellency Pierce M. Butler, governor of and commander-in-chief in an' over said State:

"'Be it known that there is due from the State of South Carolina to The President and Directors of the Bank of the State of South Carolina one thousand pounds (or five hundred pounds) sterling, lawful money of Great Britain; which sum of money the said State promises to pay the said President and Directors of the Bank of the State of South Carolina or their assigns, in London, on the surrender of this certificate, on the 1st day of July, in the year of our Lord one thousand eight hundred and sixty-eight, (or one thousand eight hundred and fifty-eight,) with interest thereon at the rate of five per cent. per annum, payable semi-annually, from the date hereof, as it becomes due, on presenting the several warrants herewith annexed at the banking-house of Baring Brothers & Company, in London.

(Signed) "'PIERCE M. BUTLER, *Governor.*

"'Countersigned by—
"'W'M EDW. HAYNE,
[SEAL.] "'*Comptroller-General.*'

"To the bonds were attached the following coupons, signed by the cashier of the bank, to wit:

"'SOUTH CAROLINA STATE STOCK.

"'Under an act ratified 1st June, 1838.

"'BARING BROTHERS & Co., *London:*

"'Pay to bearer on 1st July, 1839, twenty-five pounds (or twelve pounds ten shillings) sterling, being a half year's interest on bond No. for £1,000 (or £500) sterling.

(Signed) "'C. M. FURMAN,

"'*Cashier of Bank of State of South Carolina.*

"'£25 or
"'£12 10 } Sterling.'

112 "On the bonds was the following endorsement, signed by the president of the bank, to wit:

"'In pursuance of, and by authority of, an act of the legislature of the State of South Carolina, ratified on the 1st day of June, one thousand eight hundred and thirty-eight, The President and Directors of the Bank of the State of South Carolina, with a capital of three millions one hundred and fifty thousand dollars, (including the present loan,) for value received, assign and transfer the within bonds to or bearer, and hereby guarantee the punctual payment of the principal and interest of the said bond as it becomes due at place specified within.

(Signed) "'C. J. COLCOCK,

"'*Pres. of the Bank of the State of So. C'a.*'

"Mr. McDuffie exhibited in England double credentials: The first executed by the governor of South Carolina, constituting him agent of the State, and the record by the president of the bank, constituting him agent of the bank.

"In Mr. Duffie's address to the public, he makes the following statement:

"'The legislature, in order to make assurance doubly sure, has provided that, in addition to the general pledge of the faith and resources of the State, particular funds shall be specially appropriated and solemnly pledged and set apart to secure the punctual payment of the interest and principal of this loan. As this fund will partly consist of the profits which shall accrue from the two millions now to be borrowed, the mode in which it is to be used will be stated. It is to be deposited in the bank of the State of South Carolina as so much capital, to be employed by that bank, acting as the fiscal agent of that State, in accomplishing the object of the loan.'

"In the same address he publishes two sections of the act of 1838, which were as follows:

"'SECTION XI. It shall be the duty of The President and Direct-
113 ors of the Bank of the State of South Carolina to cause to be opened in the books of the said bank, an account, in which they shall debit themselves with the profits arising out of the additional capital created out of the two-million loan aforesaid, for the year ending on the first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and with all the future profits of the said loan, as the same shall be hereafter annually declared; which said fund, with all its accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof, and it shall be the duty of the president and directors of the said bank annually to report to both branches of the legislature the exact state of that fund.

"'SECTION XII. When the profits of the said bank of the State of South Carolina shall have paid the interest of certain stocks, for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and final redemption thereof.'

"Upon the faith of these representations and assurances, the house of Baring Brothers & Company themselves became purchasers of these bonds to a large amount, and were active in inducing others to become purchasers. They believe that the bondholders became creditors of the bank (whose capital they furnished) as well as of the State. They relied on both. They relied on the honor and good faith of a State which had hitheato proved true to its engagements, but were all pleased that the bank, a moneyed institution, whose life was credit, and a corporation amenable to the laws of the country, was interposed between the State and trustee for the creditors."

As a part of the history of these procedings, it is proper to notice the fact that the public advertisements, calling in billholders and fire-loan stockholders in America, continued to be published from March 3, 1868, to May 20th, of the same year, in one or more of the leading newspapers in the cities of Charleston, Cincinnati, New Orleans, New York, and Augusta, and that after May 20th, until July 1st, 1868, the following amended order was published in the same papers:

114 "OFFICE OF MASTER IN EQUITY,
"*Charleston, May 20th*, 1868.

"I. All presenting claims in the above case, including holders of bills or bank-notes, are required, in addition to the proof of the claims, to render into this the master's office, a statement, verified by affidavit, of the time when the same came into the possession of the holder, and the consideration paid therefor.

"II. It is further ordered, that all parties who have presented, or shall present their claims before Master Tupper, before the 1st day of June, shall be allowed until the 1st day of July next, within which to supply the statements as to the time the claims were required, and the consideration paid for them. But nothing in the order contained shall be construed as extending the period for presenting claims beyond the 1st day of June.

"III. It is further ordered, that neither the amended order nor the orders hitherto made, are intended to conclude or to in any way pedjudice the right or equities of the parties to this writ.

(Signed) "JAMES TUPPER,
"*Master in Equity.*"

The exhibits filed with the report of the special referee, James W. Gray, esq., show the extent to which proof has been made up to this time.

I may add, that certain general creditors, such as persons claiming for work and labor have, by consent of parties already in, been allowed at a late day to come in, representing themselves and others having like interests. These are entitled to an adjudication of their claims upon the assets in controversy, which have been a "fund in equity," since the decretal orders of March 2d, 1868. In April, 1869, the fund was transferred from the custody of the bank officers into the hands of a receiver, appointed by the court, in whose hands they still remain, subject to the order of the court.

The first inquiry presenting itself, is directed to the equities of the

complainants' bill. These seem all to be based on the effect of the
115 original charter of the bank; and it is assumed that the charter pledges to billholders through all time a lien on the bank, its capital and assets, in preference to all other creditors. I cannot perceive in the charter relied on, any provision which makes the bank, in this respect, differ from other banks. It is well settled that stockholders, or a sole stockholder, though that stockholder be a State, cannot withdraw from a bank its capital or assets to the injury of creditors—that the assets of a bank unable to pay "belong solely to the creditors." It has been decided that an act of a State legislature intended to effect such a result, that is, to withdraw the assets from the reach of creditors, is unconstitutional and void.

But these cases, although in some of them billholders were the creditors moving, make no distinction in favor of this class of claimants over others. It is simply as creditors that their rights are defined. Their rights are sustained as against stockholders setting up ownership, but the respective claims of creditors among themselves are not discussed. "A corporation," it is said, "unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may, by virtue of its general power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made bona fide for the payment of its debts." [See Abbott's Digest, Law of Corporations, p. 44, and cases there cited.] An ordinary charter, then, cannot be construed as pledging capital or assets so as to constitute a lien. Otherwise, it would be too late to make preferences. Billholders, then, in my judgment, have not, as such, any priority by virtue of the charter of the bank over other creditors, and it is so adjudged.

The question that then presents itself is, whether the fire-loan bondholders have any claim to preference; and, if so, to what extent? That they are creditors, I consider too plain for argument. In my judgment, sections 11 and 12 give them, most clearly, a lien on the thing pledged. On this head, the authorities cited by counsel are to my mind conclusive. In the language of Judge Story, I consider it "a contract for an hypothecation" of future profits, and that when the profits once came into existence, "the right of the pledgee immediately attached."
116 (Story on Bailments, 294; Coote on Mortgages, 233; 4 Kent, 138; 2 Spencer's Equity, 777; and Kelley's Reports, 435.) As to the extent of this lien, I am of the opinion that it covers everything which the bank now has in its possession, or rather the entire "fund in equity" in the hands of the receiver. Mr. Waring testifies that nothing contributed by the State as capital now remains in the form in which it was placed there. He says that it appears that the bank has accounted to the State for all capital advanced from all sources, with interest in full thereon; that, in fact, the State has withdrawn from the bank over and above the amount of capital advanced, a large sum, and is now heavily indebted to the bank. He represents that the present assets of the bank have been considered as the result of past profits—that the sinking-fund made of profits was appropriated to the purchase of those assets. He states that, since the year 1838, the profits of the bank have exceeded the value of the property and assets now held, and declares that, "if set apart and applied as directed by the act of 1838, the fund accumulated would have greatly exceeded the present fire-loan debt." All other debts for which profits were pledged, he says, have been paid. Mr. Furman entirely confirms this testimony.

It would appear, from this evidence, that, as a matter of fact, the present property and assets of the bank are covered by a pledge of

"profits." In the case of Curran *vs.* The State of Arkansas, (15 Howard,) Judge Curtis expresses himself as follows:

"Whatever losses a bank sustains are losses of the capital paid in by its stockholders. That is the only fund it has to lose. When it has become insolvent it has lost all that fund, and has nothing belonging to its stockholders. In some sense a bank may be said to owe its stockholders for the capital they have paid in. With the leave of the State they have a right to withdraw it, after all debts are paid; and if the State is itself the sole stockholder, it may withdraw its capital while any of it shall remain. But from the very nature of things, it cannot withdraw capital from an insolvent bank, because it has none of its capital remaining."

117 The chief justice of this State, in regard to this very bank and these assets, uses the following language:

"While it continued solvent, it was matter of little consequence to a creditor, how far or to what extent the legislature interfered by its control. When, however, the fact of its insolvency is apparent, whether the State is the sole stockholder or a co-stockholder with individuals, the fund which it supplied as capital no longer remains." (The State ex rel. the Attorney-General vs. The President and Directors of the Bank of the State.)

The counsel for defendants have, in further confirmation of this view, cited the case of Garnet vs. Stewart, (3 Sim., 308,) in which Vice Chancellor Shadwell decided that "a devise of rents and profits of the estate is the same as a devise of the estate itself." Again, they cite Legard vs. Hodges, (3 Brown Ch. Rep., 531.) This case was twice argued, and on re-argument Lord Loughborough confirmed the previous decision, that "to set apart and appropriate a third part of rents, etc., (to secure the payment of a debt,) was an equitable lien on that estate, the rents of which were so appropriated."

From the authorities above cited, it would seem that the pledge of the profits in the 12th section of the act of 1838 is equivalent to a pledge of the whole capital of the bank for the payment of the fire-loan bonds, and the redemption of certain stocks provided for in that section; and those stocks having long since been redeemed, the lien of that section extends to all the present property and assets of the bank. According to the view I take of the 11th section, it makes little difference whether the foregoing conclusions are or are not correct. It is provided in that section that, "all the future profits of the said loan, as the same shall hereafter be annually declared, which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof." Here is a pledge of the two millions capital and its future profits. It is in proof that the State has long since withdrawn all the capital placed in the bank by it, except this fire-loan, therefore

118 the loan is the only capital left in the bank, and this being solemnly pledged for the final redemption of the fire-loan bonds, the present assets must be applied to their payment.

Having thus determined that the holders of the fire-loan bonds are entitled, by virtue of the act of 1838, to priority over the billholders in payment from the assets of the bank, the next question to be considered is as to the status of the holders of the fire-loan stock. It is contended, on the part of both bond and bill holders, that the fire-loan stock is not entitled to the lien created by the act of 1838. Both bonds and stock are equally a part of the fire-loan. The authority of the act of 1838, was to procure the loan on the best terms, either in Europe or

America, by the issue of bonds or other contracts. Whether the whole of the loan, or any part of it, was made in Europe or America, and whether the form of the loan thus effected should be by bonds or other contracts, as, for instance, stock, was entirely a matter of discretion. When thus created, in whatever form of contract, the loan, to the extent of two millions of dollars, was equally protected. It was for the whole loan thus created that the bank of the State was to provide for the payment of the interest and principal, and to which the pledges of the act of 1838 were to apply. The act makes no distinction in reference to any portion of the loan. It places the whole upon the same footing.

It was urged, in argument, that the 1st section of the act of 1838 authorized and directed the governor of the State to issue the bonds or other contracts, countersigned by the comptroller-general; whereas, the certificates of the fire-loan stock exhibited in the case show that they are signed by the State treasurer, and countersigned by the president of the bank, and because they are countersigned neither by the governor nor the comptroller-general, the holders of the certificates cannot claim the benefits of the act. It appears that, in 1839, with the consent of the governor, it was determined to issue, as a part of the loan, a six-per-cent. stock, of which three hundred thousand dollars was raised in that year. The act of 1840 made further provisions in
119 relation to the fire-loan. In that act it was declared that transfers of the stock issued by virtue of the act of 1838, and the new certificates requisite upon such transfers, should be made by the same officers, and in the same manner as for other State stocks; and, as if to leave no doubt that the stock when thus issued was to be entitled to all the benefits of the act of 1838, it added, "but the certificate shall upon its face exhibit that such stock has been issued under the provisions of the said act."

It was further urged in argument that while the certificates of the fire-loan stock are headed "Loan under an act for rebuilding the city of Charleston," yet the stocks exhibited allege that they are created by virtue of section 1 of an act for rebuilding the city of Charleston, ratified 1st June, 1838, and therefore that the stock has reference simply to the 1st section, and is not entitled to the guarantees of the other sections.

In the view thus urged I cannot concur. It is the 1st section only which creates the loan, whether in the shape of bonds or stocks. Without the 1st section there would be no authority for the issue of the bonds, or of any contract for a loan. Both the bonds and stocks are created by the 1st section. The other sections provide the security for their redemption. It was upon the faith of the guarantees of the act of 1838 that the bonds and stocks were taken, whether in Europe or America. Until the act of 1865, the legislature, by the reports of their investigating committees and their whole course of action, recognized that the pledges of the act of 1838 applied without discrimination to the whole loan of two millions.

It is urged that, by the 11th section of the act of December 21st, 1865, entitled "An act to raise supplies for the year commencing in October, 1865," a statutory assignment of the assets of the bank was made; first for the benefit of the bondholders, second, for the benefit of the stockholders, and third for the redemption of the outstanding bills issued by the bank. Conceding that the State had a right to assign assets belonging to it for the benefit of creditors, and that it had a right to make preferences, the proof in this showing, as we have seen that it had already withdrawn more than it had put into the bank, I can-

120 not conceive how the assignment of funds belonging to the creditors, and not to the State, could affect the rights of the parties. If I am right in my conclusions, the State had, long before the passage of the act of 1865, solemnly pledged every dollar that remained in the bank in 1865 for the redemption of the fire-loan bonds and stock, and therefore had no right to make any other or different disposition of that fund. In the one view it was disposing of property that the State did not own; and in the other it was a violation of solemn contract upon the faith of which the loan was taken. But if I should be in error in this view, there is another which to my mind is conclusive as to the invalidity of that section of the act of 1865. Section 22 of Article I of the Constitution of the State of South Carolina, adopted September 27, 1865, declares that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." On the 21st day of December, 1865, while that constitution was in full force, the legislature passed an act entitled, "An act to raise supplies for the year commencing in October, 1865;" and the 11th section of that act directs how the assets and property of the bank shall be distributed. I am of the opinion that every provision of the constitution of a State is mandatory, and the legislature is bound thereby; hence I cannot resist the conviction that the 11th section of the act of 1865 is unconstitutional and void; because it is a subject entirely distinct from the subject of the act and is not expressed in the title. (Baldwin vs. The Mayor of New York, 42 Barbour, 549.)

It is, therefore, ordered and decreed that, from the assets of the bank in the hands of the receiver, the fire-loan bondholders and the fire-loan stockholders be first paid principal and interest accrued and accruing up to the date of their payment, upon the surrender by them of their bonds and certificates of stock respectively; but should the assets be insufficient to pay the whole amount due the bondholders and stockholders, then they shall be divided ratably between them.

121 But if the assets should be more than sufficient to pay the fire-loan bondholders and the fire-loan stockholders, it is further ordered and decreed that the remaining assets in the hands of the receiver be applied pro rata to the payment of the holders of the bills issued by the bank, the depositors and other creditors of the bank, subject, however, to the modification hereinafter made.

The next question which presents itself for my consideration is as to the right of the holders of bills issued by the bank.

The State has become a party to these proceedings. It cannot be sued; but it may consent to be a party. No process of the court, proprio vigore, can affect it. No order or decree can act upon it in invitum. When it does become a party, it is to the end that through its courts it may be advised of its rights or its obligations; and when these are ascertained, the highest sanction has been secured to enforce the one or discharge the other. In this case the State has, of its own will, submitted to its courts the decision of the issues involved. At the hearing, it was so announced by the attorney-general then representing the State.

In considering the relation of the State to the holders of the bills of the bank, it is not necessary to give critical interpretation to so much of the act of 1812, as declares that "the faith of the State is pledged for the support of the bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency." When a State becomes a corporator, in that capacity, it retains no attribute of its sovereignty. It is regarded as an individual, so far

as any exercise of control is concerned, in relation to the corporation. What an individual corporator may do, the State, as a corporator, may do, and no more. And where, as in some States, the constitution provides that the State may be made a party to a suit, and therefore, in such suit, a decree in invitum be made against it, there is no difference between the condition of a natural person and that of the State as a party to that suit. In this case, the assent of the State to become a party does not carry with it the assent that the order or decree should reach its property. The object, therefore, of the State connecting
122 itself with this suit is that the nature and extent of its rights and obligations may be ascertained by the court.

It has been shown, in this case, that the State contributed to the bank the whole of its capital. Its rights were those of a stockholder, and so were its obligations. The capital of the bank is pledged for the payment of its bills. It is held, or it is intended to be held, by the proper officers of the bank, as a trust-fund, of which they are the trustees. The right of the stockholders to a return to them of what they contribute, can only arise when the debts of the bank have been paid. According to the testimony adduced, the State has drawn from the bank not only the whole amount arising from all sources which it ever contributed to its capital, with interest thereon, but it is largely indebted to the bank besides; and while this fact appears, the billholders, depositors, and other creditors are left unpaid.

If an individual held the relation to the bank which the State holds, he would be required to pay back to the bank at least as much as would satisfy its creditors. The right of the creditor against the State is as clear as it would be against the individual stockholder. The obligation of the stockholder is as clear in the one case as in the other. Nor is it lessened because in the case of the individual the order or decree could enforce his duty, while in the case of the State its courts have no such process. But it cannot be supposed that a State will need any process, when it has the sense of duty in regard to its obligations announced in its own courts. If the State had not withdrawn from the bank the whole of its capital, the creditors of the bank would be paid. To those who would become creditors of the bank, the State had pledged that capital. At various times the courts of the State have declared that the capital of the bank was pledged to its creditors. The pledge of the State and the judicial declaration of it in the case of this bank, was that which had been everywhere declared to be the law governing such corporations. The principle that the capital belonged in the first place to the creditors of the corporation, and not until they were
123 satisfied, to the stockholders, is settled beyond dispute. And equally well settled is it, that stockholders who have withdrawn capital before the claims of creditors are satisfied will be forced to bring it back.

The statement that the whole of the capital has been withdrawn by the State, has been made very positively by Mr. Furman and Mr. Waring, and no denial has been made of its correctness.

In giving force to the act of 1838, and recognizing the prior equity of the creditors under that act, I could not fail to observe the pledge of the faith of the State which it gave to those who, in that matter, became its creditors. Unquestionably the creditors of the bank have a right to ask of the State that its pledge in relation to that bank be redeemed. They only ask the State to give back to the bank that which belonged to it—which was its property, and which belonged to its creditors, and is their property.

In the discussion of the case something was said concerning the inhibition of the State to provide for the billholders, because of the amendment to the Constitution forbidding the payment by the seceding States of debts contracted in aid of the war. The point thus raised cannot be sustained. In the first place, the claims are against the bank, and the State is involved, because it has taken the assets of the bank. The bank can have no more reason to question its liability in regard to its bills than would any other party to a contract who had entered into a lawful engagement during the war. But another reason is all-sufficient. It is proved the bills now in question were not issued in aid of the war, but to relieve the necessities of the people, arising from the loan of bills of an older issue to the Confederate States. If any bills came within the terms of the amendment referred to, it is the bills which have been redeemed by the State by the issue of its bonds.

It was also said that the bills proved in this case had been purchased at a low rate; and that the claim for their face was unjust and extortionate. It would not be easy for one who had sold these bills in open market, at less than their face, to a purchaser bona fide, to come
124 into court and claim that he who had purchased should not receive from the bank more than he had paid for them; and it would be equally difficult to understand how the bank could claim that it was only liable for the amount paid by each purchaser for its bills. Within a comparatively recent period, the public securities of the State were sold at very reduced prices. If the objection now made as to these bills be well taken, it would seem to be equally applicable to all public securities. And yet few things would more affect the value of the public securities of the State than such an objection seriously pressed by those having control of its affairs.

But this objection, considered in connection with the bank, ceases to have any claim to consideration. When the bank issued its bill, it promised to pay the holder the amount specified on its face. That promise was made either to create a valid legal obligation, or to work a fraud. As it is not conceivable that it was made for the latter purpose, it must have been for the former. For every bill that it issued the bank received consideration. For that it made the promise that is contained in the bill. And there is nothing afterwards and between other parties that can diminish its obligation to pay that bill according to its face to a bona-fide holder.

In the case of Furman, Green & Co. vs. P. L. Michel, collector of taxes, recently heard and decided in the Supreme Court of the United States, the question was considered how far the guarantee of the State of Tennessee extended. In the judgment of the court this language is used:

'An attempt is made to restrict the operation of the guarantee to the person who, in the course of dealing with the bank, receives the notes, and not to extend further. * * * The guarantee is, in no sense, a personal one. It attaches to the note; is part of it; as much so as if written on the back of it; goes with the note everywhere, and invites every one who has taxes to pay to take it."

It would seem, from the last-mentioned authority, that the State of South Carolina was bound to redeem these bills to the extent of the original pledge made in the act of incorporation, and that cer-
125 tainly was to the amount of the capital stock furnished by the State. But I prefer to rest my judgment of the liability of the State in this case upon what I regard as the true and unquestionable

grounds. The bank is insolvent. The State is its debtor. It owes, first, the amount of capital stock furnished by the State; and it owes, second, large amounts borrowed by the State in addition thereto. The creditors of the bank, therefore, have the right to payment of the amount of the indebtedness of the State into the bank for the purpose of being applied to their debts respectively. So far as the bills are concerned, this claim should be for the full amount of the face of said bills, while such bills were issued upon a specie basis, and until they were practically confederate transactions, from which time, taking the date of the bill as the data, they should be scaled like other transactions made with reference to confederate money.

What I have said in reference to the bills of the bank applies, in my judgment, with equal force to the depositors and other creditors of the bank whose claims are unsecured under the act of 1838. It is therefore—

Ordered, That this case be referred to the Hon. B. F. Dunkin, as special referee, and that he call in the two classes of depositors represented in this case by those who deposited before the war, and those who deposited during the war, by advertisement, published in the Charleston Courier, Charleston News, and Columbia Phœnix, for six weeks, on or before the 15th day of August, 1870, to prove their claims; and if such claims are not so proved, they will be barred from all participation in the assets of said bank, or claims upon the State. And it is further—

Ordered, That the said special referee take proof as to the character of the indebtedness to said two classes of depositors, as to whether the transactions were with reference to lawful money of the United States or confederate currency; and such of them as he finds to have been in confederate currency, he will ascertain the value of each claim in the lawful currency of the United States. And it is further—

126 Ordered, That the said special referee also ascertain what portion of the bills already proved were issued with reference to confederate currency; and as to such bills, he will ascertain their value in lawful money of the United States. And he will also ascertain what portion of the other debts already proved were contracted in confederate currency; and, as to such debts, he will ascertain their value in lawful money of the United States at the date of the contract. It is further—

Ordered, That the said special referee ascertain the amount of the indebtedness of the bank upon the principle of this decree, giving to the State credit for the amount of stocks and other securities left with the bank as collaterals, and giving to the State also credit for the amount of the bills redeemed by the issue of bonds. And it is further—

Ordered, That the said special referee tax the costs of this suit, and report to this court on the first day of its next November term.

R. B. CARPENTER.

MAY 7th, 1870.

DABNEY, MORGAN & CO.,
vs.
THE PRESIDENT AND DIRECTORS OF THE Bank of the State et al.

The holders of the bills of The President and Directors of the Bank of the State of South Carolina, appeal from the decree of Judge Carpenter, on the following grounds:

1. Because, by the charter of the bank, in 1812, and the several renewals of that charter, and the rule of law applicable in such cases, the assets of the bank must be applied to the payment of the creditors of

the bank; and among such creditors are the holders of the bills of the bank.

2. That over so much of the assets of the bank as are or may be necessary for the payment of the billholders and creditors of the bank, the State, as sole stockholder, has no lawful right or power to make any appropriation or disposition of them by which the creditors of the bank would be delayed or defeated in the recovery of their claims.

127 3. That the pledge of the profits of the bank, as it appears in the act of 1838, is only the pledge of what the State, being entitled to take after the debts of the bank were paid, had a right to pledge. That profits are only ascertained after debts are paid; and no profit exists when the assets are not sufficient to pay debts.

4. That the act of 1838 was not a modification of the charter of the bank; it was not so intended, and cannot be so construed; that when the act of 1838 was passed, the charter of the bank, by the act of 1812, was of full force, and so continued in all respects and without modification, so far as creditors of the bank are concerned, in its renewal by the act of 1833, and subsequently by the act of 1852.

5. That the lawful issue of the bills of the bank, of whatsoever dates of issue they may be, unless otherwise plainly designated, are of the like and equal legal obligation. That the obligation they impose arises from the charter, and the liability they create is referred to the charter.

6. That the proposition that the act of 1838 was a notification to the holders of bills of the bank, subsequently issued, of a modification of the charter of the bank, or that their rights as creditors of the bank under its charter, were intended to be or were in fact modified or impaired by the act of 1838, is not the true interpretation of the act of 1838, and is inconsistent with the terms of the act of 1812, and the subsequent acts renewing the said charter; and with the purposes of those acts in the establishment of a bank, and the pledge of the State as it is made in the act of 1812, and in the other acts of 1833 and 1852.

7. That whatever may have been the claims of the holders of the fire-loan bonds, if the addition to the capital of the bank arising from those bonds had been left with the bank, when the State withdrew from the bank the whole amount that had been so deposited with the bank, as between the State and the bank, the primary liability for these bonds was with the State, and should have been so decreed.

128 8. That with such primary liability on the State, the State could not have any right to appropriate or apply the assets of the bank to the payment of these bonds, and leave the proper creditors of the bank unpaid.

9. That, where the holders of the fire loan bonds had an admitted liability of the State for their claims, and the creditors of the bank had no other admitted claim than against the assets of the bank, the holders of the fire-loan bonds should be confined to their remedy against the State.

10. That the holders of the fire-loan stock are not creditors of the bank. The stock they have is a part of the public debt of the State, so recognized by the State, and the holders thereof have no more right to claim the assets of the bank, to the exclusion of the proper creditors of the bank, than have the holders of any portions of the public debt of the State.

11. That the holders of fire-loan bonds and stocks, who advanced moneys to the State, under the act of 1838, with notice, under that act, that such moneys were to become a part of the capital of a bank, have no equity against creditors of the bank who deal with the bank on the faith of its capital being liable to its creditors.

12. That no part of the stocks and securities set forth and considered as belonging to the sinking-fund, was proved to belong to that fund. The act of 1852 expressly provided the manner in which the profits of the bank should be disposed of, and the manner in which securities belonging to the sinking-fund should be designated. None of the stocks and securities were so designated. They could not be identified by Mr. Waring, the cashier, as belonging to that fund. No account was kept of investment for that fund; and the decree in this case establishes, as a fact, which no witness undertook to prove.

13. That, in relation to the choses in action left in the hands of lawyers for collection, the real estate of the bank, the State bonds lodged with the bank by the State as collateral security for the repayment of moneys advanced for the new State-house, and the shares of the Charlotte and South Carolina Railroad lodged also as security for the advances made by the bank to pay the subscription of the State to
129 that railroad—these nowhere appear as the property of the bank otherwise than as collaterals to secure the repayment of loans made by the bank in the course of business—are not regarded by the bank as profits; constitute no part of what is regarded as the sinking-fund; and do in fact represent so much of the capital of the bank, as not withdrawn, still remained in its possession, and is now in the hands of the receiver.

MAGRATH & LOWNDES.
PORTER & CONNER.
WHALEY, MITCHELL & CLANCY.

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE Bank of the State of South Carolina, and others.

Take notice that The President and Directors of the Bank of the State of South Carolina, and the State of South Carolina, two of the defendants in the above-entitled cause, appeal to the supreme court of this State, from so much of the decree in this cause of his honor, Judge R. B. Carpenter, in the court of common pleas for the county of Charleston, filed May 7, 1870, as is embraced by the following words, to wit:

"But if the assets should be more than sufficient to pay the fire-loan bondholders and the fire-loan stockholders, it is further ordered and decreed that the remaining assets in the hands of the receiver be applied pro rata to the payment of the holders of the bills issued by the bank, the depositors and other creditors of the bank, subject, however, to the modifications hereinafter named."

D. H. CHAMBERLAIN,
Attorney for The President and Directors of the Bank of the State of South Carolina, and Attorney-General of the State of South Carolina.

CHARLESTON, S. C., *May* 25, 1870.

130 DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE Bank of the State of South Carolina, Baring Brothers and Company, and others.

The solicitors for Baring Brothers & Co., in the above case, were con-

tent that Judge Carpenter's decree should be at once enforced without modification; but having received notice of appeal from complainant's solicitors representing billholders, Hayne & Son, on the part of defendants representing fire-loan bondholders, submit the following

GROUNDS OF APPEAL.

1. The decree errs in deciding that the act of 1838, for rebuilding the city of Charleston, created a lien on the assets of the bank in favor of the fire-loan stockholders, equal in all respects with the lien given by that act to the fire-loan bondholders.

It is submitted that if any lien was given by said act securing that portion of the debt incurred by the State in issuing State stock, the lien was intended for the protection of the State and not the holders of the stock. Neither the circumstances of the issue, nor the language of the scrip, imply any direct contract with the holders of the stock; and it was competent for the State, at any time before condition broken, to waive or postpone the lien intended for its own protection. According to the testimony there has been no failure to pay the holders of this stock up to this day. The principal is not due and the interest has been paid, latterly in gold. The stockholder cannot therefore claim by subrogation, there being no condition broken. The bonds are past due, and no interest has been paid since January, 1868.

3. The decree errs in setting aside the 11th section of the act of 1865, entitled "An act to raise supplies." This section, it is submitted, is germane to the subject-matter of the act expressed in the title,
131 as it was in effect a provision to raise supplies for meeting a debt. And if not germane, it is not on that account void.

4. Defendants representing fire-loan bondholders submit further, that the 11th section of the act of 1865 does not contravene the act of 1838. On the contrary, in apportioning the assets, first, to payment of the fire-loan bondholders, it confirms the contract made with them in pursuance of said act; and in postponing fire-loan stockholders, the State simply waived its own security and violated no contract.

5. The act of 1865 was the action of the sole stockholder, and being ratified and acted upon by the president and directors of the bank and accepted by the preferred creditors, it became an assignment by the corporation.

6. If this assignment, made before the passage of the bankrupt act, violated no previous contract, it is a valid assignment, and gives priority to fire-loan bondholders.

7. If the circuit decree should be so modified as to place billholders upon the same footing with fire-loan bondholders and stockholders, then defendants submit that the holders of such bills who came into possession of the same after the insolvency of the corporation, cannot claim to share the fund in equity as creditors according to the face value of such bills, but they must share said fund, if insufficient to pay debts in full, according to the price paid for said bills.

8. Should the circuit decree be so modified as to place all creditors of the corporation upon the same footing, defendants submit that persons who deposited confederate money in said bank have no claim upon the fund in equity.

HAYNE & SON,
Solicitors for Baring Brothers & Co.
JA'S B. CAMPBELL,
Of Counsel.

132 Supreme court, April term, 1871.

DABNEY, MORGAN & CO.
vs.
THE PRESIDENT AND DIRECTORS OF THE BANK of the State of South Carolina,

Opinion.

MOSES, *C. J.*

The decree of the circuit judge presents the issues on which his judgment was rendered, and the notices furnish the grounds of appeal on which its reversal or modification is asked.

The question submitted for our consideration involves the mode in which the assets held by the receiver, appointed by the court, for and on account of the corporation lately existing as the Bank of the State of South Carolina, admitted to be insolvent, are to be distributed among its creditors, and these may be divided into three classes: First, the holders of bonds issued under the act of June 5, 1838, for rebuilding the city of Charleston; second, the holders of 6-per-cent. stock claiming by virtue of the same act; third, the billholders of the said corporation; and, fourth, the depositors and general creditors. The case has been ably and elaborately argued, and has received all the consideration which was demanded, more from a deference to the zeal with which the various claims have been pressed, than from any serious difficulty on the part of the court in arriving at what it regards a just conclusion. It will be necessary, before proceeding further, to refer to so much
133 of the history of the institution as relates to its establishment, and to the character of the claims which are before us for adjudication.

By the act of 1812, (8 S. L. 24,) a bank was established "on behalf of and for the benefit of the State." All the stocks then owned by the State, of any description whatsoever, and enumerated in the act, the unexpended money in the treasury, and all the taxes to be thereafter collected on account of the State—the last subject to the drafts on the part of the State, authorized by legal appropriation—were to constitute and form its capital, and was vested in the president and directors to be elected by joint ballot of the legislature. It was made a corporation and body politic, "and the faith of the State was pledged for the support of the said bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency." The corporation had the right to hold property, and the same to convey at pleasure; to sue and be sued. All the powers usually enjoyed by banking corporations were vested in the president and directors; the whole capital having been contributed by the State, it was the sole owner and stockholder. By the charter the income of the bank was to be a part of the revenue of the State, and the bills or notes of the corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, were to be receivable at the treasury, either at Charleston or Columbia, and by all the tax-collectors and public officers, in all payments for taxes or other moneys due. It is not necessary, for the solution of the several questions before us, to refer to the subsequent acts of the legislature, which from time to time increased the capital of the bank, by requiring all public officers to deposit their receipts therein, or created loans which the corporation was to bank, except the act of June, 1838, (7 S. L., 156,) on which the fire

loan bond and stock holders found their claim to a specific lien on the assets of the bank, which now alone consist of real estate, bonds, stocks, and outstanding personal debts. The charter was to continue until May 1, 1835. In December, 1833, (8 S. L., 67,) it was extended to May 1, 1856; and in December, 1852, again extended to January 1, 1871, (12 S. L., 151.)

134 By the act of June, 1838, (7 S. L., 156,) entitled "An act for rebuilding the city of Charleston," the governor was directed, in the name of the State, to issue "bonds or other contracts," to be countersigned by the comptroller-general, not to exceed two millions of dollars—one million to be payable at the expiration of twenty years, and the other million at the expiration of thirty years—at a rate of interest not exceeding 6 per cent., for the purpose of procuring a loan, on the credit of the State, to rebuild that portion of the city of Charleston then lying in ruins; and it was enacted by the 1st section thereof that the faith and funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payment of the said bonds or contracts, with the interest thereon."

By the second section the governor was authorized and directed to commission such agent or agents as the president and directors of the Bank of South Carolina should appoint, which agent or agents were empowered to receive the said bonds or contracts, and to make all such arrangements as in his or their judgment may be deemed expedient for procuring the said money, and placing it to the credit of the State, subject to the draft or order of the president of the bank. By the third section it was enacted that "the money, when realized in Charleston, shall be deposited in the Bank of the State of South Carolina, and shall become a part of the capital thereof." The tenth, eleventh, and twelfth sections we quote in full, as the fire-loan bond and stock holders rely on them as creating a trust on their behalf, attaching on the assets now held for appropriation and distribution:

SEC. X. "It shall be the duty of The President and Directors of the Bank of the State of South Carolina to make proper provisions for the punctual payment of the interest of such loan as may be effected upon the credit of the State under the provisions of this act, and also for the ultimate payment of the principal thereof."

SEC. XI. "It shall be the duty of The President and Directors of the Bank of the State of South Carolina to cause to be opened on the books of the said bank an account in which they shall debit themselves with the profits arising out of the additional capital created out of the two-millions loan aforesaid, for the year ending on the first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and with all the future profits of the said loan, as the same shall hereafter be annually declared; which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof; and it shall be the duty of the president and directors of the said bank annually to report to both branches of the legislature the exact state of that fund."

SEC. XII. "When the profits of the said Bank of the State of South Carolina shall have paid the interest of certain stocks for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loans and the final redemption thereof."

Though the bank was established "on behalf of and for the benefit of the State," which held the relation to it as a sole stockholder, its

obligations and responsibilities to its creditors are to be measured by the same standard which would be applied if it constituted a company representing the interest of individual stockholders. It can demand no privilege, immunity, or exemption by reason of its connection with the State, nor is it subject to a higher responsibility because it represents a State as its only stockholder. In regard to its creditors it can occupy no other position than a corporation composed of private citizens.

It is claimed for the fire-loan bond and stock-holders that the 11th and 12th sections of the act of 1838 create a prospective lien upon the "fund" pledged in section 11, and upon the profits in section 12, to wit, the profits arising from the original capital of the bank after payment of certain debts, for which said profits had been previously pledged, and which have been fully satisfied. It is not to be denied that a pledge may be created by written directions to hold property to meet a specified demand, or to devote to a special and stated purpose the rents and issues of a
135 particular estate. In fact, any contract in writing by which one engages that, for a consideration, another may have the income or yield of either real or personal property, (in proper form to affect such property,) or the profits of his stock or other monied investment, will amount to such a devotion of that so set apart as the principal from which the rents, income, or profits were to accrue, as in equity will constitute a charge upon it. The principal, as in the case of a technical pledge, is not restricted to such property as may be in existence, but will extend to future earnings and income. The authorities referred to in the argument leave no doubt of the position. It is necessary, therefore, to inquire, assuming that some pledge was thus made by the said act, what was its character and extent? The word "fund" is used only in the 11th section. The bank was required to debit itself with the profits arising out of the additional capital of the said two-millions loan for the year ending on the first of October, 1839, and with all the future profits of the said loan as the same should thereafter be annually declared; which said fund and its accumulations were solemnly set apart for the payment of the interest on the said loan and the final redemption thereof. The additional capital was not to remain in the bank, but was to be engaged in its usual business; the bank, however, being required to loan to applicants for the purpose of rebuilding in the city of Charleston the same amount of money, if so much was required. It was the profits arising out of the additional capital for the year ending first of October, 1839, with all the future profits of the said loan, as the same shall be annually declared, which were to constitute the "fund." These were not known and could not be anticipated, and the bank was, therefore, properly directed to keep them in a distinct form, that their amount might at once be capable of ascertainment. The 12th section gives the same direction as to the general profits of the bank after the redemption of certain stocks for which they had been previously set apart.

The fire-loan bond and stock holders, however, contend that, even if the two millions additional capital, under the construction to be given by the court to the said sections, cannot be included in the fund pledged for their debts, then that the remaining assets of the bank represent its profits during its existence, and are covered by the lien of the fire-loan debt, which must be wholly satisfied before any other creditor can have any share of them. The argument proceeds upon the ground that a pledge of the profits was a pledge of that out of which the profits are to arise. Authorities are referred to for the purpose of showing that a devise of rents and profits is a devise of the land itself, and will carry

the legal as well as the beneficial interest therein. The application of the principal to devises proceeded from the disposition of the courts not only to effect, if possible, the purpose of the testator, but to give the devisee the bounty intended for him in a shape in which he could enjoy it, and to place at his command the direction and control of the very fund to the profits of which he was entitled. When the rents and issues are only given for a limited time, the rule does not seem to apply, for the reason of it ceases. (Earl vs. Grim, 1 John, C. R., 499.) The doctrine has been extended to legacies of dividends and interests in stock and funds. It was held in Phillips vs. Chamberlain, (4 Ves., 51,) that where trustees were directed by a will to pay dividends and interest of certain stock and funds to the legatees, share and share alike, and the survivor' of them as they attained the age of twenty-one, etc., the whole interest passed to them. The rule has also been applied to deeds, as in Le Grand vs. Hodges, (3 Brown, C. R. 531,) where it was held that "a covenant to appropriate one-third of the produce of a real estate to raise a sum of money is not a mere personal covenant suable at law, but creates a lien upon the land, and the covenants are entitled to have it specifically performed." In all the cases where the principle is enforced, it is with the view of giving effect to the intention of the instrument by requiring that the right and use under it may be co-extensive with the design implied from its terms. It would, however, be difficult here to infer that, in an act where the legislature employed both the words
136 "capital" and "profits," apparently having in mind the well-established difference in their import, the use of the latter word in the section was intended to convey, by way of pledge, not only the profits, but the capital itself. The rule is never so enlarged as to include that which is not covered by the immediate grant. If "an agreement as to the produce of land affects the land itself," can it be so amplified as to include land of which the produce is not conveyed or pledged? So, if the pledge insisted under the act of 1838, of the two-million capital, or the profits which it has yielded, cannot be redeemed for want of a fund which can properly represent either, can the holders of the fire-loan bonds and stock claim, by virtue of their lien, the assets now held for the bank, unless it can be shown that they are of the profits so pledged to them?

By the 11th section of the act a distinct account of the profits of the additional capital was directed to be kept, which said fund and its annual accumulations were to be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof. So far from this having been done, according to the testimony of Mr. Waring, the cashier, although the requirement was brought to the notice of the president, it was purposely avoided. Though the net profits of the bank were annually ascertained, the particular sources from which they arose could not be distinguished. Before, therefore, these holders of bonds and stock under the fire-loan could enforce their claim against the existing assets, it would be incumbent on them to show that they in some way represent the profits pledged to them by the said 11th section. If they cannot be distinguished, it is beyond their ability to do so.

What practical advantage can they derive from the 12th section, which, they aver, gives them a lien on all the profits of the bank "when they shall have paid the interest of certain stocks and redeemed the stocks for which they have heretofore been pledged and set apart," admitting that such payment has been made?

The bank is insolvent. Its capital is gone, and all that the corpora-

tion holds are the assets already referred to. In what view can they be considered as the representatives of profits? Were they ever so considered by the bank? In 1821, (6 S. L., 665,) the legislature provided "a sinking fund for the redemption of the 6-per-cent. stock of the State," and the bank was required to open an account in which it should debit itself annually with the profits, and the fund and its accumulations were set apart for its redemption. In 1852 (12 S. L., 150) the profits of the bank were directed "to be carried to the credit of the sinking-fund, and the account of the fund was to be kept in such a manner as to show at all times what particular bonds, notes, stocks, and other securities belong to the said fund." Not only did the bank fail to keep such an account, but the sinking-fund has never been distinguished from the capital, and was banked on in common with it. (Report of Comp. Gen'l Harrison, B'k Comp., 692; Report of Pres't Elmore, Ib., 555; Report of Investigating Committe of Legislature, (1841,) Ib., 225; Report of Pres't Furman; Reports and Resolutions of Sessions of 1863, p. 72, 73.)

Notwithstanding the insolvency of the bank, it is yet claimed that all which remains in the shape of property to this once great monied institution, whose capital is not only gone, but whose assets are inconsiderable when compared with the extent of its indebtedness, represent its profits.

There would, as it appears to us, be something anomalous, if not contradictory, in holding what may be left of value to an insolvent corporation as the representative of profits. If there were profits, no matter how small, how could there be insolvency?

"The word insolvent, unless controlled by the context, means unable to pay debts, in the ordinary acceptance of the phrase." (2 Lindley on Partnership, p. 695. Le Blanc, J., in Bayley vs. Schofield, (1 M. and S., 353,) says: "I take it, insolvency, as it respects a trader, to mean that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs." Here, unfortunately, this long-continued litigation in regard to all that is left of this cor-
137 poration plainly concedes the sense in which the term is to be applied. Its liabilities are largely in excess of its means to meet them.

The word profit presupposes an excess of the value of returns over the value of advances. (1 Lind., 11.) If the amount of capital invested in a particular business is returned to its owners, while there is no gain there is no loss. If it is returned increased there is profit, but if it is swallowed up in the speculation in which it has been employed, though there may be assets left which were liable while the capital was in active employment, still if they are not sufficient to meet the engagements contracted in the enterprise to which the capital was applied they can in no sense be taken as standnig in the place of profits, which could never result from a profitless employment. "In ascertaining the profits of a business, the value of the partnership property is to be found, and the original capital, with thereon, if necessary, is to be deducted. The residue will represent the profits. (Dunham vs. Bradfield, L. R. 5, 519, Ch. Appl. Cases.)

What are the remaining assets to be considered? When a corporation is insolvent, as we have said in the State vs. Bank of State of South Carolina, (S. C. Rep. N. S., 76,) the fund applied as capital no longer remains, that is to say, the amount which the stockholder advances as capital is not in a shape or form to which the term in its proper significance can apply. If A invests his whole estate of $10,000

in trade, and in winding up his affairs finds that he owes $15,000, and has assets in value equal to only $5,000, the fund which constituted the capital of the business is exhausted, although the assets on hand were derived from the operations in which it was employed. We should, however, be rather inclined to the co'clusion that they represented the money of his creditors which had been used for their acquisition. If it is asked how can this apply to the State bonds lodged by the State with the bank as collateral security for the repayment of money advanced by the bank for the new State-house, and the shares of the Charlotte and South Carolina Railroad, lodged as security for advances made by the bank to pay the subscriptions of the State to that railroad, the answer is, that the money used by the bank for such advances was of the funds for which it now stands liable to its creditors. In no sense can they be considered the profits of the bank.

If a pledge was given by the act of 1838, amounting to a specific lien, the subsequent legislation of the State in 1839 and 1852, by appropriating the subject-matter already pledged to the fire-loan, could not affect its validity. If the pledge amounted to a contract, it would be no sufficient answer when its bond or stock holders sought to enforce it, that the debtor had pledged the same security to another creditor. Nor can the failure of the holders to take action be construed as an acquiescence on their part with the new direction of the fund already pledged to them. The conceded solvency of the bank, with its prospect of so continuing, made it an object of little moment to the creditor how the legislature interfered in the disposition of its funds, and no want of good faith can be attributed to the State in attempting to divert securities already appropriated; for, by the charter, "the faith of the State was pledged to the support of the bank, and to supply any deficiency in the funds specifically pledged, and make good all losses arising from such deficiency." It is intimated, however, that the bondholders under the fire-loan are not creditors of the bank; that its guaranty of the bonds by the statement which appears upon them must be referred to the power conferred on the bank by the act, and whoever accepted them did so with the limitation imposed on the extent to which the bank could guarantee them. We say intimated, because the objection was not pressed with an apparent confidence in its soundness.

It was competent for the bank to incur an obligation in the legitimate course of its business. It was incident to its powers as a body politic to enter into contracts not inconsistent with the purposes for which it was organized, unless forbidden by the charter. To say that it was restricted to those created by the issue of its notes would have so cramped and encumbered its administration that the end for which such cor-
138 porations are generally organized, would, to a large extent, have been defeated. No one would doubt the right of the bank to transfer a note made payable to its order, and yet such an act would create a liability on its part. Here the loan to be raised was to be added to its capital, and it was to its interest to lend its name as a guarantor, to effect a purpose which promised profits in its employment. But even if the guaranty was originally without authority, its recognition by the State at various times and on various occasions has placed its validity beyond dispute.

Before we consider the effect of the act of 1865 on the claims of the several classes of the creditors of the bank to the assets now held on its account, it is proper that we dispose of so much of the appeal on the part of the fire-loan bondholders as submits error in the decree, in deciding "that the act of 1838 created a lien on the assets of the bank in

favor of the fire-loan stockholders, equal in all respects with the lien given by that act to them." While we hold that, by the terms of that act neither the said bond or stock holders are entitled to the said assets, under any appropriation or contract which confers a lien, we can distinguish no difference in their rights growing directly out of the act itself. The character of the fire-loan stock is not to be determined by the fact that the money raised through it was never appropriated to the purpose which the legislature contemplated. It constituted a part of the two millions directed to be borrowed, and if there were any assets which could be held subject to a lien by the force of the act in favor of the bondholders, we do not see how the holders of the stock could be placed on any different footing in regard to them. The difficulty with those who hold that portion of the loan which was issued in the form of stock, is that they have no contract with the bank. It never guaranteed the payment of the stock, which though "a contract" under the act entered into by the governor on behalf of the State, imposed no liability on the bank. In all the legislation of the State, in the reports of the president and directors, and of the investigating committees appointed by the general assembly, it has been recognized as issued under the fire-loan act, and, therefore, protected by its provisions. The act of 1840, (11 S. L., 130,) refers to the stock "as issued in virtue of the said act of 1838," and the certificate of it is required "upon its face to exhibit that such stock has been issued under the provisions of said act." Although not a debt against the bank, it would have been entitled equally with the bondholders to the benefit of any assets which could be referred to the pledge under which both classes now prefer a claim.

If the act of 1838 cannot be held to establish a lien on the assets in the hands of the court for distribution, then the bondholder's claim that the 11th section of the act of 1865 (13 S. L., 267) is, in itself, a valid assignment of the effects of an insolvent debtor, and that, by its terms, they have a preference to the said assets. This is resisted by the fire-loan stockholders, the billowners, and depositors. The said section, after directing that the branches and agencies shall be closed, and that the principal bank at Charleston shall cease to be a bank of issue, authorizes and requires the president and directors "to collect the assets and property of the bank, and hold the same specially appropriated."

"First, to the payment of the principal and interest of the bonds known as the fire-loan, payable in Europe; second, to the principal and interest of the fire-loan bonds, payable in United States; and third, to the redemption of outstanding notes hitherto issued by said bank."

The legal title to the property of the bank was in the corporate body, the president and directors. The sole stockholder is the State itself. The property, if not bound by a valid lien, may be disposed of by the bank in its corporate capacity. It is, however, but the agent of the stockholder, bound to execute his directions in the disposition of the fund which it holds, by and under his appointment. A corporation has the same right to deal with its property, through a conveyance, whether by actual sale or assignment, for the benefit of creditors, as an individual has. It is a right incident to ownership, and its exercise is not trammelled with any
139 other conditions or restrictions than those which the law imposes.

A preference, if fair and honest, may be given by an insolvent person to one creditor, to the exclusion of all others, and this right is not denied to a corporation, though without means to meet all its liabilities. "A corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may, by virtue of its gen-

eral power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made bona fide for the payment of its debts." (Abbotts Dig. Law of Corp., cases there cited; Angell & Ames on Corp., 155 and 156.) Is the act of 1865 such an assignment as conferred a vested right on the creditors which it proposed to prefer, and therefore irrevocable on the part of the State, the sole stockholder of the corporation? If it amounts, as is contended, to a satutory assignment which transferred the assets from the State to the creditors in the order prescribed, then the creditors took a vested interest, beyond the power of a subsequent legislature, either as to repeal or modification. If the fund had been transferred by the agent to the hands or dominion of the creditor, such transfer would have operated to change the ownership, and the power over it would have passed from the principal. Before, however, any express act of transfer or change of control, the mere expression of willingness on the part of the creditor to accept the disposition intended by the principal would not so affect the relation of the principal to the fund as to deprive him of all power over it. While in the hands of the agent, unless affected by words sufficient to create a vested right, it is within the discretion of the principal to revoke the order for its disposition, or entirely to recall it. In Story on Agency, section 465, where the author treats of the revocation of authority to an agent, it is said: "So if it has been in part put in the course of execution, but not to such an extent as to become obligatory between the parties, as if preliminary proceedings only have been instituted." From the passage of the act of March 3d, 1868, the date of the injunction granted in this case, no action was taken by the president and directors, which changed the legal or beneficial interest in the fund, nor up to that time was there such an acceptance of its provisions on the part of the creditor, proposed to be preferred by it which amounted to a contract that would preclude the State from farther intervention between them and the bank in the administration of the said assets. The act of September, 1868, (14 S. L., 22,) by its 11th section, in express terms repealed the said section of the act of 1865, and unless it can be held to have vested a right, or constituted a contract on the part of the State, with the creditors named in it, it was within the power of the legislature, not representing the sovereignty of the State, but in its capacity as sole stockholder, to revoke the authority to its agent, to perform such an act, which, while it remained unexecuted, did not change its control over the profits to which it referred.

The statute cannot have the force and effect which is claimed for it as an assignment. The title to the assets was not in the State, but in the bank. The direction was not to the president and directors to execute an assignment by which the legal title was to be transferred, but was "to hold the assets especially appropriated to the payment of certain classes of the creditors in a named order." The State may, by an act of the legislature, divest itself of property and vest it in another. There are here, however, no words which show an intent to deprive itself of all control of the fund. Mr. Justice Story in Furman et al. vs. Jackson, (5 Peters, 594,) says: "Whatever may be the inaccuracy of expression, or the inaptness of the words used, in a legal view, if the intention to pass the legal title can be clearly discerned, the court will give effect to it, and construe the words accordingly." Is there anything in the language employed in the statute which denotes an intention to change the legal ownership, and if this is not accomplished by the terms of it, how can it be said to amount to an assignment? The act of 1865

until executed, was but the assertion by the State "of its proprietory rights over the assets," but was neither in design or effect a contract with the fire loan bond or stock holders.

Even if the preference sought to be derived from the act could
140 be sustained as applying to the classes of claimants who are in fact creditors of the bank, what can be said of so much of it as undertakes to "appropriate" the property of the bank to persons who do not stand in the attitude of creditors to it? We have already said that, in our judgment, the holders of the fire-loan stock were in no way creditors of the bank, while they are creditors of the State. The assets of the corporation must be held first applicable to the payment of its own creditors. When, therefore, the State undertook to appropriate the property of the bank to the payment of debts for which the bank was not liable, but which the State contracted, and in which it alone was the debtor, it brought itself within the principle announced in Curran's case, (15 How., 304,) and which was adopted by this court in the State vs. The Bank of the State of South Carolina, before referred to. It was an attempt to divert the property of the bank from the reach of its creditors, and to devote it to the payment of a debt contracted alone on the faith and credit of the State—to abstract it from the debts of the bank and dedicate it to a debt of the stockholders, for which the bank was not bound. It is not of consequence to consider how far this attempt to invade the rights of the creditors of the bank by applying its property to the payment of creditors alone of the State, might tend to invalidate so much of the said section as was intended for the benefit of the bank creditors, for, according to our view, no rights vested under it, and the inquiry is, therefore, immaterial.

The conclusion at which we have arrived, as to the claim of the bond and stockholders of the fire-loan under the act of 1838, and of their several preferences under that of 1865, renders unnecessary the consideration of the grounds of appeal submitted in behalf of the bill-holders and depositors, save the seventh, which is in the following words: "That, whatever may have been the claims of the holders of the fire-loan bonds, if the addition to the capital of the bank arising from those bonds had been left with the bank, when the State withdrew from the bank the whole amount that had been so deposited with the bank, as between the State and the bank, the primary liability for these bonds was with the State, and should have been decreed." The claim of the holders of the fire-loan bonds to a share of the assets does not arise, as we have said, by virtue of any lien or pledge made by the act of 1838. The liability of the bank rests in the express contract it made with the bondholders, by which it guaranteed the payment of the principal and interest. The withdrawal by the State of the whole amount raised by the loan, and which had been added to the capital of the bank, cannot change the character of the guaranty, or release the bank from the obligation which it imposed. The State was the primary debtor, the bank the guarantor; aad it is not easy to conceive of any proceeding, or even contract between the original debtor and the guarantor, which, without the express or implied assent of the creditor, could discharge the guarantor from the liability which he had assumed.

The attorney-general, as "attorney for The President and Directors of the Bank of the State of South Carolina," and "as attorney-general of the State of South Carolina," appeals from so much of the circuit decree as is embraced in the following words, to wit: "But if the assets should be more than sufficient to pay the fire bondholders and the fire-loan stockholders; and it is further ordered and decreed that the re-

maining assets in the hands of the receiver be applied pro rata to the payment of the holders of the bills issued by the bank, the depositors and other creditors of the bank, subject, however, to the modification hereafter made." We have not had the benefit of any argument in support of the said ground, and cannot well conceive how it can be taken on behalf of the president and directors, who, in their answer, "admit their liability at law for genuine unpaid bills, and, if in funds, to pay all indebtedness, would not hesitate to pay them when presented." In the order of the court, in this cause, of the 3d of March, 1868, the former attorney-general was made a party defendant "in behalf of the State, he being in court and consenting, for the purpose of sus-
141 taining the validity of the act of 1865," and, in the answer which he filed, says that "the general obligation of the bank to redeem its bills is admitted," while he claims that the bank is bound to carry out the provisions of the acts of 1838 and 1865. Nay, the very act of 1865, to sustain the validity of which the attorney-general was made a party, recognizes the billholders as creditors of the bank, by applying the assets of the bank to their payment, but postponing them to the bond and stock holders of the fire-loan. If we properly appreciate the point raised by this ground of appeal, it denies the right of payment from these assets to all creditors of the bank, save and except those under the fire-loan. If, then, the assets shall be more than sufficient for their satisfaction, what is to become of their surplus? Is it to be enjoyed by the stockholder of the bank? He can have no right but to what may remain after all the debts of the bank have been paid. What then is to become of it? "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation." * * * "Stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all the debts are paid." (R. R. Co. vs. Howard, 7 Wall, 409.)

It is not perceived upon what possible ground it can be pretended that the property of a corporation having a right by charter to issue bills, and the property not bound by any lien, can be exempt from liability to meet them. The charter, as if to give additional strength to the obligation on the part of the bank incurred by its issue, declares, in the 6th section, "that bills or notes which may be issued by order of the said corporation, signed, &c., promising the payment of money to any person or persons, his, her, or their order, or to bearer, though not under the seal of the said corporation, shall be binding and obligatory upon the same in like manner, and with the like force and effect as upon any private person or persons, if issued by him, her, or them, in his, her or their, private or natural capacity or capacities, as shall be assignable and negotiable in like manner, or if they were so issued by such private person or persons." Throughout the whole argument on the part of the holders of the fire-loan, although they set up a priority in the fund held for distribution, it was not pretended that the billholders and other creditors did not have a right to any of the portion, which might remain, after first satisfying the claims in favor of which a preference was averred. We fail to discover a single argument upon which such a proposition as is submitted by the said ground can be maintained.

For the reasons given in the decree, we concur with the circuit judge in holding that the claimant' of bills are entitled to the full amount of the face of the said bills without any regard to the price at which they may have purchased them. As to such as may have been issued by the bank, under circumstances which show that they were not issued on a specie basis, they must be subjected to the same rules which apply to contracts which practically amount to confederate transactions.

Depositors are creditors of the bank. They part with the title to their money and loan it to the bank. (Thompson vs. Riggs, 5 Wall, 678.) There may be an express contract, or one may be inferred from the attendant facts, that the title to the money deposited remained with the depositor; but if nothing is said or done which may vary the general rule, a mere naked deposit changes the title to the money and at once establishes the relation of debtor and creditor. Having in view the periods at which it appears some of the deposits were made, a qualification must, however, be attached, that if the money deposited was not accepted by the bank, with reference to a specie basis, the depositor will be entitled in national currency to only so much as his deposit in such currency was worth at the time it was made.

On the part of the billholders and depositors it is claimed that the rights of the bondholder as creditor of the bank by reason of its guaranty should be qualified—"1st, by compelling him to show that his claim against the State will be either delayed or denied; and, secondly, that, whatever sum he takes from the assets of the bank,
142 the other creditors will be subrogated for that sum to the claim of the bondholder against the State."

It does not appear to us that the principles which, either at law or in equity, govern the relation between the guarantor and guarantee can be exacted or enforced, when the original debtor is a State and beyond the reach of the process of the court. If the guarantor can set up a defence by reason of some failure on the part of the guarantee, to pursue his rights against the principal debtor, through which has ensued a loss of some security which the guarantee held for his debt, it is on the assumption that the law has afforded adequate means to avert or prevent such loss. The process of the law, however, is powerless against the State. If it is the debtor, the arm of the court cannot reach it. The creditor has no security but in its faith and pledge—in its sense of moral obligation and of honor.

We do not say this because we perceive that the holders of the fire-loan bonds have done anything in regard to their debt against the bank, which in anywise deprive them of the full benefit of their guaranty, but simply for the purpose of indicating their position as to the principal creditor, against whom they are without remedy through the courts. And the inquiry is rendered entirely unnecessary, when it is remembered that the principal is the sole stockholder of the very corporation which has guaranteed the bonds.

The second ground on which the proposition is rested, would seem to imply that the billholders and depositors have no claim against the State for what may remain unpaid to them out of the assets of the bank—a position entirely inconsistent with that assumed both in the bill and throughout the argument. If they and the bondholders have valid and subsisting demands against the State, for the amounts unpaid by reason of the insufficiency of the bank assets to meet the whole, what additional security would the billholders and other creditors have by being subrogated to the claim of the bondholders for the sums which they may receive of the said assets. In marshalling securities, "the general principle is, that if one party has a *lein* on or interest in two funds, for a debt, and another party has a lien on an interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, wherever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund." (1 Sto. Eq., sect. 633;

Walker vs. Covar et al., Sup. C't S. C.) The reason of the rule ceases where both the parties have a like and equal claim to both the funds, and such we regard the condition of all the creditors of the bank.

By the charter of 1812 "the faith of the State was pledged for the support of the bank and to supply any deficiency in the funds specifically pledged and to make good all losses arising from such deficiency." The pledge for the support of the bank involves an obligation on the State, which had the supervision and control of its management, to hold its capital and profits always ready to meet the liabilities, which, by virtue of its establishment, it had a right to incur. The engagement to supply any deficiency in the funds "specifically pledged," was an understanding, that, in the event of a failure of the capital furnished (and referred to by the designation of the funds "specifically pledged") to respond to the debts incurred by its own corporation, the State would make good "the losses" which might ensue. As if to leave no room to doubt the real purpose and intent of the pledges, *to make* the 6th section of the charter, wherein the State limits the debts which the bank shall at any time owe, and makes the directors in whose term an excess may happen, liable in their private capacities, nevertheless provides that such liability of the president and directors shall not be construed to exempt the bank, or its property, from liability for such excess, nor their insufficiency to exempt "the State of South Carolina from being also liable for, and being chargeable with, the said excess," the State here actually announcing its liability for debts of the bank, contracted
143 in express disregard and violation of the charter. In the opinion of the constitutional court, delivered in 1822, in the case of the State vs. Billis, (2 M. C. L., 20,) it is conceded, that the faith of the State is pledged by the charter, in case of the insolvency of the bank, for the redemption of its notes. From the day of its establishment to the present moment, there has never been evinced a disposition on the part of the State even by intimation, to repudiate its liability for the debts of the bank. The whole course of its legislation exhibits a contrary interest.

The monied relations between the bank and the State might well be said to have identified them. In fact, the treasury played but a secondary part in the financial affairs of the State. The bank was its cashier. By the act of 1819, (6 S. L., 136,) all payments by the treasurers of the upper and lower divisions were to be by drafts or checks upon the bank, while on the other hand, by the same act, no payment of money was to be made by any public officer in any other manner than by check or draft on the bank, "so as to make it indispensably necessary for such public officer to deposit his money in such bank or its branches, previous to his making such payment."

The State, from time to time, raised loans by the issue of stock and otherwise, and pledged, not only its own faith, but the capital of the bank, and its annual profits, for the payment of the interest, and the final redemption of such debts.

To refer to the many reports of the president and directors, and of the committees of the legislature appointed to examine into and report on the condition of the bank, which directly admit the liability of the State for the debts of this corporation, established "on behalf of and for the benefit of the State," would only encumber this opinion with a repetition of the acknowledgment, never questioned, denied, or even qualified by a single act or resolution of the general assembly.

A reference to one or two will suffice, for, as was said in the argument, "the language of one report is the language of all." In the re-

port of the committee made to the legislature in December, 1841, (Bk. Comp., 221,) it is said, "and the extraordinary security for the management of the bank is contained in these words: 'the faith of the State is hereby pledged for the support of the said bank, and to supply any deficiency in the funds specially pledged, and to make good all losses arising from such deficiency.'"

"Thus this institution has, in reality, the whole resources of the State as its stay and support. It cannot fail in any event, though the State may suffer."

In the report of the committee, made in 1847, (Bk. Comp., 311,) it is said: "There are some very peculiar features in the constitution of this bank of the State, which, it seems to your committee, not amiss at this time to bring more particularly to the view of your honorable body. This bank is, in many respects, an independent treasury. The funds of the State are in effect kept by herself, or by a corporation entirely under her control. * * * Her assets are in her own vaults, and only to be used, so far as the theory of the establishment is concerned, for the benefit and at the will of the State." In the examination of the president of the bank, which accompanies the report, he says: "Beyond those resources which the bank has within itself to convert its notes into coin, the State has added its pledge, in case of its failing, that it will pay off all its liabilities."

The legislature, by a joint resolution, approved September 25th, 1868, raised a committee of three, "to enquire into the assets and liabilities of the bank," with instructions "to enquire into and report for what debts of said bank the State is liable." (14 S. L., 158–9.) On December, 1868, the report was made, in which it says that "it (the bank) really and in fact had no independent existence from the State, but was wholly subject to and controlled by it. True, it had a legal entity for business purposes, but was really nothing more nor less than the State engaged in banking business. The debts, therefore, of the bank, created during, as well as prior to, the existence of the rebellion, were liabilities incurred in the name and on behalf of the State." (Rep. and Res. of 1868–9, p. .)

144 The report proceeds to discriminate between the bills issued prior to and during the war; and as to the latter, holds them subject to the prohibition of the constitution against "debts contracted in behalf of the rebellion," to which objection (passed upon by the circuit decree,) we shall hereafter refer. The general assembly, by act approved September 15th, 1868, (14 S. L., 22,) provided for the funding of the bills issued prior to December 20th, 1860, in bonds of the State, with interest at six per cent., the interest payable semi-annually, and the principal to be redeemed within twenty years after the date of the bonds, provided they were presented to the treasurer before January 1st, 1869. The decree pronounced in the case before us puts all the bills on the same footing, without regard to the date of their issue, holding that they are not affected by the amendments to the Constitution of the United States forbidding the payment, by the seceding States, of debts contracted in aid of the war. If they are not subject, in this regard, to the prohibition in the amendment of the Constitution of the United States, they are free from the objection to the same effect in the constitution of the State; and there being no appeal from so much of the said decree as holds them exempt from such interdiction, it stands as the judgment of the court.

The liability of the State for all the debts of the bank does not rest alone on its charter; and the legislation which has so identified the

State with the institution as to make it not only its monetary agent, with power to contract debts on its account, but its creature. The circuit decree rules as a question of fact, (and one which has not been disputed in the whole *cau*'se of the long litigation,) "that the State has drawn from the bank not only the whole amount arising from all sources, which it ever contributed to its capital, with interest thereon, but it is largely indebted to the *State* besides."

If the bank had been a corporation representing private stockholders, and on the dissolution its stock, or the money arising from the sale and transfer of it, had been distributed among them, "the established rule in equity is that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same satisfaction of their debts." (R. R. Co. vs. Howard, 7 Wal., 410, and the cases referred to.) It is because the capital-stock of a corporation constitutes a trust-fund for the payment of its debts. If, then, the whole capital of this bank, with the interest on it, has not only been withdrawn from the corporation by the single stockholder, but he is found to be largely indebted to it, and the assets which remain are not sufficient to satisfy its outstanding liabilities, he must return a sufficient amount to meet them. The property of the corporation must first respond to its debts.

The case of Curran vs. Arkansas, so often referred to in the argument, directly applies to the aspect of the case now under consideration. The other points made involved the question of preference among the creditors of the bank. This affects the relation of all of them to the stockholder, who has absorbed the whole capital, leaving them unpaid, as was held in Curran vs. Arkansas—if the charter of a bank set apart a fund as capital, out of which debts are to be paid, it amounts to a contract with those who became creditors on the faith of it, that such fund shall not be diverted to other purposes. That the State was the sole owner of the capital-stock does not at all vary the relation of the bank to its creditors.

The State, as a stockholder, carried no attribute of its sovereignty to this corporation, for whose engagements it became responsible. (The State vs. The President and Directors of the Bank of the State of South Carolina, 1 S. C., R. N. S., p. 77.) It is true that it is beyond the reach of any remedy that can be enforced by the process of the court, but this only adds additional weight to the moral obligation. In this case it is not at least weakened by the fact that its own legal officer, with his consent, was made a party on behalf of the State for the purpose of sustaining an act by which the State undertook to dispose of the assets of the bank—its outstanding notes being specifically
145 included among them—or that it afterwards admitted its liability for all the bills issued prior to December 20th, 1860, in providing for their payment by its own assumption. The circuit judge, in his decree, says: "In this case, the State has, of its own will, submitted to its courts the decisions of the issues involved. At the hearing, it was so announced by the attorney-general, then representing the State." Not only has the present attorney-general, directly on the part of the State, submitted to this court, by his appeal, error in so much of the decree as directs any of the assets of the bank, after paying the fire-loan bond and stock holders, to the payment of the bills, but an argument on behalf of the State was heard from assistant counsel employed.

As was said by the senior associate, Mr. Justice Willard, in the case of The State vs. The President and Directors of the Bank of the State

of South Carolina, to which we have referred, "The State can neither be sued nor compelled to appear in its own court. When it enters the courts it does so voluntarily; and, it is to be presumed, for the reason that some important object cannot be obtained except through the act of the judicial arm of the Government. The judgment of the court cannot bind the State. It may be the medium, however, when the State is in the position of a party before it, of informing it of the rights which its own acts confer on others, and the obligations which by reason thereof rest upon it.

It is ordered and decreed that so much of the circuit decree as gives a preference to the fire-loan bondholders and fire-loan stockholders in the payment to be made out of the assets of the bank be set aside.

That the said assets be held for distribution among all the creditors of the bank in ratable proportion to the amount of their respective debts. Any collaterals or securities held by any such creditors for or on behalf of the bank to be accounted for by them.

That the claims of holders of bills of the bank issued since December 20, 1860, be subject to the condition in this opinion expressed in relation to them.

That, in taking the account of claims by depositors, the value in national currency to which they may be severally entitled shall be assessed by the circuit court, not only with regard to the time at which the respective deposits were made, but to the facts and circumstances (if any) through which any contract expressed or implied may have been created between the bank and the depositors, as to the money-value for which the bank was to be liable, for or on account of such deposits.

That such parts of the circuit decree as may not be inconsistent with the judgment of the court, as expressed in the opinion, are affirmed.

That the case be remanded to the circuit court for such orders as may be necessary to give effect to the judgment of this court; the question of costs reserved for future decision by the circuit court.

THE STATE OF SOUTH CAROLINA:

In the supreme court. April term, 1871.

I certify that the above and foregoing-written pages is a true copy of the original opinion and orders in the case of Dabney, Morgan & Co. vs. The President and Directors of the Bank of the State of South Carolina, on file in my office.

Witness my hand and the seal of the said court, at Columbia, the 9th day of December, A. D. 1871.

[SEAL.] ALBERT M. BOOZER,
Clerk of Supreme Court.

146 DABNEY, MORGAN & CO.
vs.
THE PRESIDENT & DIRECTORS OF THE BANK of the State of South Carolina, Charles M. Furman, Thomas R. Waring, Baring, Brothers & Co., Maria Simons, Jane V. Bowley, ex'ix; Edmund Bowley, A. Vanderhorst Dawson, The State of South Carolina.

To the Honorable Franklin J. Moses, chief justice of the supreme court of the State of South Carolina:

The petition of Thomas Baring, Kirkman Daniel Hodgson, Russell Sturgis, James Stewart Hodgson, Edward Charles Baring, Henry

Bingham Mildmay, William Moir, Charles Lloyd Norman, James Price, and Thomas Charles Baring, of the firm of Baring, Brothers & Co., London, England; Maria Simons, Jane V. Bowley, executrix of Jane V. Heyward; Edmund Bowley, her husband; & Arnoldus V. Dawson shews: That, in a cause entitled as above, in which Dabney, Morgan & Co. are plaintiffs, & The President & Directors of the Bank of the State of South Carolina & your petitioners, with other parties therein named, to wit, Charles M. Furman, Thomas R. Waring, & The State of South Carolina, are defendants, the said plaintiffs, among other things, prayed that section XI of an act entitled "An act to raise sup-
147 plies for the year commencing in October, 1865," passed by the general assembly of the said State, on the 21st day of December, 1865, should be set aside; that your petitioners claimed that section XI of that act was in the nature of a statutory assignment, & that, having been acted upon and adopted by The President & Directors of the Bank of the State of South Carolina, and accepted by your petitioners, and claimed by them as a contract, as set forth in their answers, long anterior to the passage of the repealing act of 1868, hereinafter referred to, constituted a contract between the said The President & Directors of the Bank of the State of South Carolina and your petitioners, & the other parties embraced within the provisions of the said section; & your petitioners interposed the protection of ariticle 1, section X, paragraph I of the Constitution of the United States against the effect of any subsequent legislation impairing the obligation of said contract. And your petitioners shew further that, in the progress of the above-mentioned cause, to wit, on the 15th day of September, 1868, the general assembly of the said State passed an act entitled "An act to close the operations of the Bank of the State of South Caro-
148 lina," which was claimed as operating as a repeal of section XI of the act of 1865 above mentioned; & the validity of *of* so much of the said act of 1868 as purported to repeal section XI of the act of 1865 aforesaid was drawn in question, & the position was taken by your petitioners that the said act of 1868, in so far as it purported or attempted to repeal said section XI of the act of 1865, was repugnant to the Constitution & laws of the United States.

Your petitioners further shew that, on the second day of December, 1871, the supreme court of the said State, being the highest court of law or equity in said State, made a final decision in the cause. And your petitioners shew further that, in the decision of the supreme court aforesaid, which is now of record, it appears that a decision in favor of the validity of the repealing clause of the said act of 1868, was rendered against your petitioners. And your petitioners are advised & believe that they have a right to have said decision or decree revised & examined in the Supreme Court of the United States in a writ of error, & your petitioners are desirous of obtaining the same.

Whereupon your petitioners pray that a writ of error be allowed them in the said cause, returnable to the next term of the Supreme Court
149 of the United States on their furnishing bond according to law.

HAYNE & SON,
JAMES B. CAMPBELL,
SIMONS & SIELING,
Att'ys for Petitioners.

Be it so.
(S'g'd) F. J. MOSES,
Chief Justice of the Supreme Court of So. Ca.

COLUMBIA, S. C., *Dec.* 13, 1871.

(Indorsed:) Copy. Baring Brothers & Co., & others, plaintiffs in error, vs. Dabney, Morgan & Co., & others, defendants in error. Petition for writ of error. Hayne & Son, Ja's B. Campbell, Simons & Siegling, att'ys for petitioners. "Filed, 13 December, 1871. Albert M. Boozer, clerk of supreme court of South Carolina.

The President & Directors of the Bank of the State of South Carolina, & the State of South Carolina, having, in my opinion, no pecuniary interest in the reversal of the decree of the supreme court of South Carolina in this cause, I, as representing said parties, decline to join in the within petition for writ of error, & consent on their behalf to abide by the decision of the Supreme Court of the United States in the cause as carried up by the present plaintiffs in error.

D. H. CHAMBERLAIN,
Att'y Gen'l So. Ca.

Charles M. Furman & Thomas R. Waring having in their answers disclaimed any pecuniary interest in the result of the suit referred to in the within petition, we, as representing said parties decline to join in said petition for writ of error, and consent on their behalf to abide by the decision of the Supreme Court of the United States in the cause as carried up by the present plaintiffs in error.

HAYNE & SON,
Att'ys for Charles M. Furman & Tho's R. Waring.

150 IN THE MATTER OF DABNEY, MORGAN & Co.
vs.
THE PRESIDENT & DIRECTORS OF THE BANK of the State of S. Carolina, Charles M. Furman, Thomas R. Waring, Baring Brothers & Co., Maria Simons, Jane V. Bowley, ex'ix, Edmund Bowley, A. Vanderhorst Dawson, & the State of South Carolina.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable F. J. Moses, chief justice, and the associate justices of the supreme court of the State of South Carolina:

Because, in the records & proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of South Carolina, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles H. Dabney, John P. Morgan, James J. Goodwin, and George H. Morgan, merchants, doing business under the name, style, and firm of Dabney, Morgan & Co.; and The President and Directors of the Bank of the State of South Carolina; Charles M. Furman, Thomas R. Waring, Thomas Baring, Kirkman D. Hodgson, Russell Sturgis, James S. Hodgson, Edward C. Baring, Henry B. Mildway, W'm Moir, Charles L. Norman, James Price, Thomas C. Baring, merchants and brokers, doing business under the name and style of Baring Brothers & Co., Jane V. Bowley, executrix of Jane Vanderhorst Heyward, Edmund Bowley, (her husband,) Maria Simons, Arnoldus Vanderhorst Dawson, and the State of South Carolina, wherein was drawn in
151 question the validity of a statute of the State of South Carolina, or an authority exercised under it, on the ground of said statute

being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error hath happened to the great damage of the said Baring Brothers & Co., Maria Simons, Jane V. Bowley, (executrix,) Edmund Bowley, (her husband,) and Arnoldus Vanderhorst Dawson, as by their petition and complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid, in this behalf, do commission you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the
152 said Supreme Court, the fourth day of December, in *in* the year of our Lord one thousand eight hundred and seventy-one; and Daniel Horlbeck, clerk of the circuit court of the United States for the district of South Carolina.

[SEAL.]

DAN'L HORLBECK,
C. C. C. U. S. for So. Ca.

Allowed by—

F. J. MOSES,
Chief Justice of Supreme Court of So. Car.

153 (Indorsed:) Baring Brothers & Co., and others, plaintiffs in error, vs. Dabney, Morgan & Co., and others, defendants in error. Writ of error from the Supreme Court of the United States to the supreme court of the State of South Carolina.

The plaintiffs in error named in the within writ having given bond & security as required by law, which is approved, this writ is allowed to operate as a supersedeas to the judgment or decision therein mentioned.

Witness the Honorable F. J. Moses, chief justice of the supreme court of the State of South Carolina, this 13th day of December, 1871.

Filed 13 December, 1871. Albert M. Boozer, clerk supreme court. S. C.

154 UNITED STATES OF AMERICA:

To Dabney, Morgan & Co., The President & Directors of the Bank of the State of South Carolina, Thomas R. Waring, Charles M. Furman, and The State of South Carolina, defendants in error, greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States, to be holden in Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Baring Brothers & Co., Maria Simons, Jane V. Bowley, (executrix of Jane V. Heyward,) Edmund Bowley, her husband, and Arnoldus V. Dawson, are plaintiffs in error, and you are defendants in error, to shew cause, if any you have, why the judgment or decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Franklin J. Moses, chief justice of the supreme court of South Carolina, this thirteenth day of December, in the year of our Lord one thousand eight hundred and seventy-one.

F. J. MOSES,
Chief Justice of Supreme Court of So. Ca.

DEC. 13TH, 1871.

155 (Indorsements.)

Lodged 8th Jan'y, 1872. P. F. Frazee, S. R. C.
Filed 13 December, 1871. Albert M. Boozer, clerk supreme court of S. C.
Ent., 50; service, 1.00—$1.50.

18 . 195. Baring Brothers & Co. and others, plaintiffs in error, vs. Dabney, Morgan & Co., and others, defendants in error. Citation. Hayne & Son, Ja's B. Campbell, Simons & Siegling, att'ys for d'f'd'ts in error. B. 82. Rec'd Jan. 4th, 1872. E. W. M. Mackey, S. C. C.

STATE OF SOUTH CAROLINA,
County of Charleston:

I, E.W. M. Mackey, sheriff of said county, hereby certify that, on the 4th day of January, 1872, I served the within citation by delivering a true copy thereof personally to James Lowndes, of the firm of Magrath & Lowndes; to Julian Mitchell, of the firm of Whaley, Mitchell & Clancy; and to W'm D. Porter, of the firm of Porter & Conner, attorneys, respectively, for Dabney, Morgan & Co., and others, defendants in error.

E. W. M. MACKEY, *S. C. C.*

STATE OF SOUTH CAROLINA,
Richland County:

I, Phineas F. Frazee, sheriff of said county, hereby certify that, on the 8th day of January, 1872, I served the within citation by delivering a true copy thereof personally to the Hon. D. H. Chamberlain, attorney-general of the State of So. Carolina, & att'y for The President & Directors of the Bank of the State of South Carolina, defendants in error.

P. F. FRAZEE, *S. R. C.*

156 Know all men by these presents that we, Baring Brothers & Co. and W. B. Gulich, are held & firmly bound unto Dabney, Morgan & Co., The President & Directors of the Bank of the State of South Carolina, Charles M. Furman, and the State of South Carolina, in the full & just sum of three thousand dollars, to be paid to the said parties, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executers, & administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirteenth day of December, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at a supreme court of the State of South Carolina, in a suit depending in said court, between Dabney, Morgan & Co., plaintiffs, and The President and Directors of the Bank of the State of South Carolina and others, defendants, a decision was rendered against Baring Brothers & Co., Maria Simons, Jane V. Bowley, (executrix,) Edmund Bowley, and A. Vanderhorst Dawson; and the said Baring Brothers & Co., Maria Simons, Jane V. Bowley, Edmund Bowley, and A. V. Daw-

son, having obtained a writ of error & filed a copy thereof in the clerk's office of the said court to reverse the decision in the aforesaid
157 suit; and a citation directed to the said Dabney, Morgan & Co., The President and Directors of the Bank of the State of South Carolina, Charles M. Furman, and the State of South Carolina, citing & admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said plaintiffs in error shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

BARING BROTHERS & CO., [SEAL.]
Per HAYNE & SON, &
JA'S B. CAMPBELL, *Attorneys in fact.*
W. B. GULICH. [SEAL.]

Sealed & delivered in presence of—
H. E. YOUNG.
L. D. CHILDS.

Approved by F. J. Moses, chief justice of supreme court of So. Ca., Dec. 13, 1871.

158 (Indorsed:) (Copy.) Baring Brothers & Co., & others, plaintiffs in error, vs. Dabney, Morgan & Co., & others, defendants in error. Bond. Filed 13 December, 1871. Albert M. Boozer, clerk of supreme court of S. C.

159 THE STATE OF SOUTH CAROLINA:

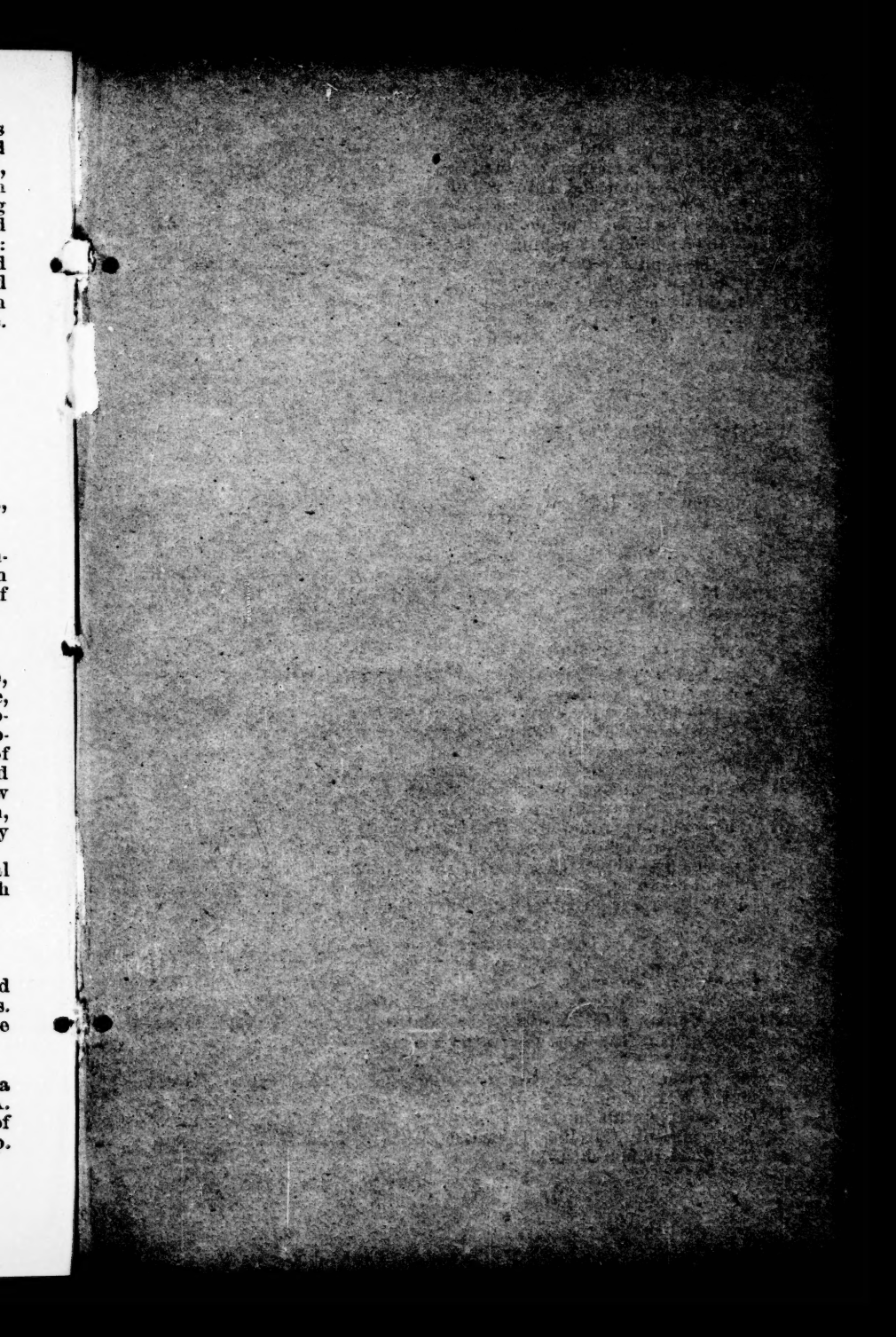
I, Albert M. Boozer, clerk of the supreme court of said State, do hereby certify the above and foregoing pages, from 1 to 158, inclusive, to be a true and complete transcript of the record and of all the proceedings which have been had in said cause in said court, wherein Dabney, Morgan & Co. are plaintiffs, and The President and Directors of the Bank of the State of South Carolina, Baring Brothers & Co., and others, defendants, as appears from the records of the said court now remaining in my custody; and the original writ of error and citation, and a copy of the petition upon which said writ was granted, and a copy of the bond, are herewith appended to said transcript.

In testimony whereof I have hereto set my hand and affixed the seal of the said court, at my office in Columbia, in said State, this fourteenth day of February, one thousand eight hundred and seventy-two.

[SEAL.] ALBERT M. BOOZER,
Clerk of the Supreme Court of South Carolina.

(Indorsed:) Transcript of record. Supreme Court of the United States, No. . Baring Brothers & Co., & others, plaintiffs in error, vs. Dabney, Morgan & Co., & others, defendants in error. In error to the supreme court of the State of South Carolina.

(Indorsement on cover:) No. 364. Baring Bro's. & Company, Maria Simons, J. V. Bowley, (ex't'x, &c.,) Edmund Bowley, (her husband,) & A. V. Dawson, plaintiffs in error, vs. Dabney, Morgan & Co., The Bank of the State of South Carolina, Thomas R. Waring, & al. S. Carolina sup. court. Filed 19 March, 1872.



Supreme Court of the United States,

October ~~DECEMBER~~ TERM—1872~~3~~

BARING BROTHERS & CO., ET AL., PLAINTIFFS IN ERROR, VS. DABNEY, MORGAN & CO., ET AL., DEFENDANTS IN ERROR. ~~No. 304.~~ (No. 153.)

BRIEF,

Prepared by Hayne & Son, Attorneys, for Baring Brothers & Co., Plaintiffs in Error.

STATEMENT.

PLEADINGS.

This case comes up upon writ of error, directed to the Supreme Court of South Carolina, the highest Court of Law and Equity in said State.

The bill of complaint in the case was filed by Messrs Magrath & Lowndes, Solicitors for Dabney, Morgan & Co., on the 30th day of October, 1867.

It sets forth, in substance, the charter of the Bank of the State of South Carolina, adopted by the Legislature of South Carolina in 1812, states the election, by the Legislature, of the President and Directors, the acceptance by them of the charter, the supply of the capital by the State, and the fact of the issuance from time to time of notes or bills of the Bank redeemable in specie. It charges that the Bank is insolvent, and claims in the alternative, first, that the capital and all assets and property of the Bank are primarily liable to the holders of the bills issued, and that these billholders are entitled to payment in full before the claims of other creditors can be considered, or, failing in

this, secondly, that billholders are entitled to share the assets or property of the Bank *pari passu*, with other creditors. It refers to the Act of 1838 for rebuilding the City of Charleston, and recites the 10th, 11th, and 12th sections of said Act.

The bill of complaint alleges that the two millions of dollars added to the capital of the Bank by the loan effected under said Act of 1838, are subject to the same conditions with the original capital. It denies that the holders of the fire loan bonds and stock are properly "creditors" of the Bank at all under the Act of 1838, or if creditors, that they are entitled to any preference over other creditors, and least of all, to any preference over billholders.

The bill charges that the 11th section of the Act of 1865, directing that the assets of the Bank should be held "espe- "cially appropriated, first, to the principal and interest of "the bonds known as the fire loan bonds payable in Eu "rope; second, to the payment of the principal and inter- "est of the fire loan bonds payable in the United States; "and third, to the redemption of the outstanding notes "hitherto issued by said Bank," is unconstitutional and void; first, as impairing the obligation of the contract raised by the charter of 1812; second, as violating the Bankrupt Act passed by Congress in 1866.

The bill prays that "the President and Directors of the Bank," as a corporation, and Charles M. Furman and Thomas R. Waring, as individuals, answer the premises, and that they account for the capital, assets and property in their possession.

It prays further, that the Court take possession of the said capital, assets and property, and distribute the same among the creditors, claiming priority for billholders. Pp. 1—13 of transcript

The President and Directors of the Bank of the State of South Carolina, by their Solicitors, Hayne & Son, on the 3d day of February, 1868, filed their answer to the above. They answer, admitting the charter of 1812, its acceptance,

the receipt of their original capital from the State, and the issuance from time to time of bills or notes made payable in gold or silver coin, and that the holders of bills are *creditors*. They deny that they are *preferred* creditors. They deny that the *present* holders received these notes as "money," or "in the expectation or hope that they would be paid in coin." They allege that these notes were bought on speculation, after the insolvency of the Bank, and with the full knowledge of this insolvency. The answer alleges that, (the Bank being insolvent, and the assets being insufficient to pay all indebtedness,) when said assets are to be distributed by the Court of Equity, the billholders, as creditors, can rightfully claim only *in proportion to the amount actually paid for the bills*. The answer further alleges, that the said billholders, as well as other general creditors, are, however, postponed to the two first named classes of creditors, to whom preference was given by the Act of 1865. It claims that a *lien* was created by the Act of 1838 in favor of these classes, but that even if the "pledges" contained in the Act of 1838 do not constitute a "lien," giving them a priority, to the exclusion of other creditors, that Act certainly constitutes these classes, to wit: the fire loan bondholders in Europe, and the fire loan stockholders in America, "*creditors*" of the Bank. The answer refers to the *endorsement on the bonds by the President of the Bank* guaranteeing, in the name of the Bank, the payment of principal and interest, in proof that these preferred classes were creditors, and creditors having peculiarly strong claims both on the State and Bank. The bondholders and stockholders being *bona fide* creditors, the answer alleges that the Bank was under the then existing laws, authorized at its discretion, to assign its effects for the benefit of creditors, giving a preference to these creditors over others.

It alleges that the Act of 1865, acted upon by the Bank, and accepted by the preferred creditors, was a *statutory assignment*.

It alleges that such preferences impair no contract, and being consummated before the passage of the Bankrupt Act could not be affected thereby.

The answer claims that the President and Directors of the Bank should be allowed to go on with the execution of the statutory assignment.

The answer further suggests, that the State should be made a party through the Attorney General, and that the preferred creditors should likewise be brought in to defend their interests. Pp. 14—22.

C. M. Furman and Thomas R. Waring, by Hayne & Son, Solictors, filed their respective answers on the 3d day of February, 1868, denying any interest except as President and Cashier of the Bank, and adopting as their own the answer of the Bank. P. 38.

On the 25th day of February, 1868, a petition was filed by Hayne & Son, Solicitors, in behalf of Baring Brothers & Co., of London, England, praying that they should be let in as parties defendants, and it was so ordered. P. 38.

On the 3d day of March, 1868, certain decretal orders were made in the cause, wherein, *inter alia*, it was ordered "that the bill be amended by making the Attorney-General, on behalf of the State of South Carolina, he being now in Court and consenting, a party defendant, *for the purpose of sustaining the Act of* 1865, referred to in the pleadings, and also by making parties defendants, the firm of Baring Brothers & Co., who have obtained leave to answer as such, and also Arnoldus Vanderhost Dawson, Maria Simons and Jane V. Bowley, Executrix of Jane V. Heyward, holders of Fire Loan stock, payable within the United States, and as representing that class of creditors. * * * It was further ordered therein, "that to avoid multiplicity of suits and waste of the fund, until such hearing can be had, and a decree rendered and in this case, all the creditors of the said corporation, whether billholders, bondholders, or claimants, in any other form, are enjoined from all

proceedings in law or equity, against such corporation, its property or assets, except as parties to these proceedings."

And it is further ordered, "that the parties to these proceedings now before the Court, and those who may hereafter be made parties, have leave to apply to this Court for any additional order or orders, or any modification of the above orders which may become necessary in the progress of this cause, the above orders not being *intended to conclude or in any way prejudge* the rights or equities of the parties to this suit." Pp. 39, 40.

On the 3d day of April, 1868, the answer of Isaac W. Hayne, then Attorney-General of the State, was filed, vindicating the propriety and constitutionality of the Act of 1865, preferring certain creditors. P. 24.

On the 15th of April, 1868, the answer of Maria Simons and others was filed, alleging that they were owners of certain stock of the State, issued under the Act of 1838, which under the provisions of said Act, was guaranteed by the Bank, and claiming the benefit of said Act as well as of the Act of 1865. P. 26.

On the 20th day of May, 1868, the answer of Arnoldus Vanderhorst Dawson was filed, to the same effect. P. 40.

The answer of Baring Brothers & Co., having been returned from Europe, was filed by Hayne & Son, Solicitors, on the 26th of May, 1868. P. 30.

From their answer we copy the following statements, which seem to us necessary to a full understanding of the case :

"In the month of April of the year 1838, the larger part of the business portion of the city of Charleston was destroyed by fire—Trade was prostrate, and thousands of the inhabitants were without shelter. Such was the extent of the calamity, that the General Assembly of South Carolina had been called together by the Governor, and had duly created and ratified, on the first day of June, 1838, an Act entitled, "*An Act for rebuilding the City of Charleston.*" This Act authorized the issue of the bonds referred to, for

the sum of two millions of dollars, thereafter known as the "Fire Loan Bonds," and hereinafter more particularly described. The funds thereby to be raised were by the scheme of the Act to be placed in charge of the President and Directors of the Bank of the State of South Carolina, to be loaned by them for the purpose of rebuilding the city of Charleston. The Act also provides for the appointment by the said "the President and Directors of the Bank of the State of South Carolina," of an agent, to be "commissioned by the Governor to proceed to Europe to negotiate said loan." Under this provision Mr. McDuffie, a distinguished and favorite citizen of the State, lately Governor, and for many previous years a leading Representative of South Carolina in the American Congress, was appointed and accredited." P. 30.

These bonds known as the "Fire Loan Bonds payable in Europe," were signed by the Governor of the State, and countersigned by the Comptroller General of the State. To the bonds were attached coupons, signed by the Cashier of the Bank, for the payment of the semi-annual interest as it accrued, at the Banking House of Baring Brothers & Co.; and on the bonds was an *endorsement* signed by the President of the Bank, whereby the Bank *guarantees* the punctual payment of the principal and interest as it becomes due, at the place specied within." P. p. 32, 33.

The answer alleges that "Mr. McDuffie exhibited in England double credentials, the first executed by the Governor of South Carolina, constituting him agent of the *State*, and the second by the President of the Bank, constituting him agent of the *Bank*. P. 32. In Mr. McDuffie's address to the public, he makes the following statement:

"The Legislature, in order to make assurance doubly sure, has provded that in addition to the general pledge of the faith and resources of the State, *particular funds* shall be specifically appropriated and solemnly *pledged and set apart* to secure the punctual payment of the interest and principal of this loan." P. 32.

And that "upon the faith of these representations and assurances, the House of Baring Brothers & Co. themselves became purchasers of these bonds to a large amount, and were active in inducing others to become purchasers. They believed that the bondholders became creditors of the *Bank* (whose capital they furnished) as well as of the *State*. They relied on both. They relied on the honor and good faith of a State which had hitherto always proved true to its engagements, but were well pleased that the *Bank*, a monied institution, whose *life* was *credit*, and a *Corporation amenable to the laws of the country* was *interposed* between the State and the creditors. The Bank, besides being the debtor, was agent for the State, and trustee for the creditors." P. 33.

* * * * * * * *

"While they admit that the bonds they represent impose an imperative obligation for ultimate redemption on the *State*, which (incurred in 1838) it is presumed can never be repudiated under any political change, they submit that this in no degree impairs the right to claim the funds specifically pledged. And if it was apparent in 1865, that, from the force of circumstance, the State would be unable to meet its obligations at the maturity of the Bonds in July, 1868, this was in itself good ground for legislative interference *to confirm the appropriation of funds as originally pledged*. The State was already in default in not providing for the interest on the bonds, and could not provide for payment of the principal at maturity. Apart from past pledges, the State, as sole stockholder in the Bank, was authorized to give the preference made by Act of 1865, and as the direct obligor on the face of the bonds and unable to pay at maturity, *was bound* to adopt every measure possible to secure funds already pledged, and to make every provision practicable for keeping up the credit of these securities and insuring their ultimate redemption. It is a work which no succeeding Legislature could desire to undo." P. 34.

* * * And they "aver that the Act was a *Statutory assignment of assets for the benefit of creditors*, and that said assignment was executed by the highest power known to the corporation, and in form the most solemn." P. 35.

EVIDENCE.

Extract from Testimony of T. R. Waring, Cashier.

"The original amount of the fire loan was $2,000,000 ; the amount now outstanding, exclusive of interest, is £109,000, payable in London, and about $318,000 payable in this State. The profits of the Bank since 1838 undoubtedly have exceeded the value of its present property and assets; and *if set apart and applied as directed by Act of* 1838, the fund accumulated would have *greatly exceeded* the present fire loan debt."

* * * * * *

"The stocks for which the capital and profits were pledged prior to 1838, and the redemption of which were charged upon the Bank, have all been paid." P. 62.

"The net profits up to October, 1860, aggregated $5,881,056, of which $2,979,168 went to the sinking fund, $2,094,223 went to payment of interest on fire loan debt, $259,948 was lost by bad debts, $547,715 was applied under various Acts of the Legislature to other purposes. The misapplication for the next four years was $171,966." P. 63.

Extract from Testimony of C. M. Furman, President.

"There was no separate account kept of the profits of the fire loan. This course was adopted in part on account of the inconvenience and expense attendant upon keeping separate accounts, and also on account of its being comparatively immaterial to do so. To explain : The fire loan came into bank in or about the year 1840. From the year 1820 the bank had paid the interest on the State debt. From 1823 the amount of debt on which the bank paid interest was $1,555,000, very much exceeding the bank capital. In 1840 the 6 per cents became due ($800,000), and

the Bank paid them off. The other State debts soon became due, and were paid off at maturity, in all $1,300,000. *All* the profits of the Bank were set apart as a provision for the payment of the fire loan, *after the debts above referred to were discharged*. Under the circumstances it was considered unnecessary to keep a separate account." P. 71.

Extract from the Testimony of Mr. Waring, Cashier.

"The Bank has paid out for the use of the State more than it has ever received from the State. On the 1st October, 1866, the State was indebted to the Bank $150,919.99, with interest. This includes amount received from the Bank on account of the fire loan, from the surplus revenue, and all other sources. This includes all funds received by the Bank of the State of South Carolina, with interest at 7 per cent., and also all payments made by the Bank on account of the State, with interest at the same rate." P. 66.

The "*Bank Compilation*," published by authority of the General Assembly, which was frequently referred to in the argument, and is cited by the Chief Justice in the opinion of the Supreme Court, p. 99, is considered in evidence.

Likewise the three sections of the Act of 1838, specially referred to in the pleadings, which read as follows :

"Sec. 10. It shall be the duty of the President and Directors of the Bank of the State of South Carolina to make proper provision for the punctual payment of the interest of such loan as may be effected upon the credit of the State, under the provisions of this Act, and also for the ultimate payment of the principal thereof.

"Sec. 11. It shall be the duty of the President and Directors of the Bank of the State of South Carolina to cause to be opened in the books of the said Bank, an account in which they shall debit themselves with the profits arising out of the additional capital created out of the two millions loan aforesaid, for the year ending on the 1st day of October, A. D. 1839, and with all the future profits of the said

loan, as the same shall be hereafter annually declared which said fund, with all its accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof, and it shall be the duty of the President and Directors of the said Bank annually to report to both branches of the Legislature the exact state of that fund.

"Sec. 12. When the profits of the said Bank of the State of South Carolina shall have paid the interest of certain stocks and redeemed the said stock, for which they have heretofore been pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and final redemption thereof." P. 88.

The eleventh section of the Act, approved the 21st December, 1865, entitled an "Act to raise supplies for the year commencing in October, 1865," referred to in the pleadings, reads as follows:

"Section 11. That the President and Directors of the Bank of the State of South Carolina be, and they are hereby, authorized and required to close the branches and agencies of the said Bank, and that the principal Bank in Charleston shall cease to be a Bank of issue, but shall continue to act as a Bank of deposit until further action of the Legislature; and the said President and Directors are hereby authorized and required to collect the assets and property of the Bank, and hold the same especially appropriated: first to the payment of the principal and interest, of the bonds known as the Fire Loan Bonds, payable in Europe; second, to the payment of the principal and interest of the Fire Loan Bonds payable in the United States; and third, to the redemption of outstanding notes hitherto issued by said Bank." 11th S. L., p. 267.

On the 15th September, 1868, an Act was passed entitled "*An Act to close the operations of the Bank of the State of South Carolina,*" the third section of which reads as follows:

"Sec. 3. That the eleventh section of the Act of the

General Assembly of the State, ratified the 21st day of December, 1865, entitled 'An Act to raise supplies for the year commencing in October, 1865,' be and the same is hereby repealed." 14 S. L. 22.

CIRCUIT DECREE.

The case came on for a hearing upon the pleadings and evidence before the Court of Common Pleas, in March, 1870, and Hon. R. B. Carpenter, Judge of the First Circuit, filed his decree May 7th, 1870, p. 71.

The principal points decided by him were :

1. That the *billholders* have *not*, as such "any priority by virtue of the charter of the Bank over other creditors." P. 77.

2. That the *Fire Loan Bondholders* are *creditors* of the Bank.

3. That the 11th and 12th sections of the Act of 1838 give said bondholders "a *lien* on the thing pledged." That said sections constituted "a contract for an hypothecation of future profits, and that when the profits once came into existence the right of the plegee immediately attached." P. 77.

4. As to the *extent* of this lien, "that it covers everything which the Bank now has in its possession, or rather the entire 'fund in equity' in the hands of the receiver." P. 77.

5. That the *lien* created by the Act of 1838 extended as well to the *Fire Loan Stock*, payable in America, as to the *Fire Loan Bonds*, payable in Europe. P. 79.

6. That the Act of 1865 is in violation of the contract created by the Act of 1838. P. 80.

7. That, if in error on this point, then "the eleventh section of the Act of 1865, is unconstitutional and void, because it relates to a subject entirely distinct from the subject of the Act, and which is not expressed in the title." P. 80.

8. And it is therefore "ordered and decreed that, from the assets of the Bank in the hands of the receiver, the Fire Loan Bondholders and the Fire Loan Stockholders be first paid principal and interest accrued and accruing up to the date of their payment, upon the surrender by them of their bonds and stock respectively; but should the assets be insufficient to pay the whole amount due the bondholders and stockholders, then they shall be divided ratably between them."

"But if the assets should be more than sufficient to pay the Fire Loan Bondholders and the Fire Loan Stockholders, it is further ordered and decreed that the remaining assets in the hands of the receiver be applied pro rata to the payment of the holders of the bills issued by the Bank, the depositors and other creditors of the Bank, subject to the modifications hereafter made." P. 80.

9. That the State is liable for all the debts of the Bank not paid by and out of the assets in the hands of the receiver. Pp. 81–83.

10. That so far as the bills of the Bank are concerned, the holders are entitled to claim "for the full amount of the face of said bills, while such bills were issued upon a specie basis, and until they were practically Confederate transactions, from which time, taking the date of the bill as the data, they should be scaled like other transactions made with reference to Confederate money." P. 83.

From this decree the Billholders, the Fire Loan Bondholders, the President and Directors of the Bank of the State of South Carolina, and the State of South Carolina, each appealed to the Supreme Court of the State, upon separate and distinct grounds. The grounds of appeal are set forth at length, pp. 83, 84, 85 and 86 of the transcript.

SUPREME COURT DECISION.

The cause was heard at the April Term, 1871, by the Supreme Court of South Carolina, and the final opinion and decision was rendered December 13, 1871.

The decision of that Court,

1st. Sustains the first second and third points of the Circuit decree. pp. 88, 89, 92.

2. It limits the *extent* of the *lien* under the Act of 1838, as interpreted in the Circuit decree, and confines it literally to the "*profits* arising out of the Fire Loan," and to the "general *profits* of the bank," and holds that no portion of present assets or property in the hands of the receiver represents "*profits*;" and that therefore neither Fire Loan bond or stockholders are entitled to any priority in the distribution of said assets, under the Act of 1838. 90, 91, 92.

3. It sustains the fifth point of the Circuit decree, although at the same time it holds that the Fire Loan stockholders are *not creditors of the Bank*. 93.

4. It virtually overrules the sixth point of the Circuit decree in holding that when the Act of 1865 was passed, there was *nothing* upon which the *lien* created by the Act of 1838 could operate. 91, 92.

5. It virtually overrules the seventh point of said decree in *assuming* that the Act of 1865 was valid for the purposes intended, and *until repealed* by the Act of 1868. p. 94.

6. The final decision of the Supreme Court is made to turn upon the *repeal of the Act of* 1865, *by the Act of* 1868 a point which was not made by the pleadings, or alluded to in the argument of counsel, or in the Circuit decree, or in any of the numerous grounds of appeal. 94.

7. The eighth point of the Circuit decree is modified by *excluding* the Fire Loan stockholders from among the creditors of the bank, and directing that the assets in the hands of the receiver be divided ratably among the Fire Loan Bondholders and all the other creditors of the bank. 101.

Finally, it sustains the ninth and tenth points of the Circuit decree. 96, 100.

ASSIGNMENT OF ERRORS.

Assignment of errors in the *final decision* of the Supreme Court is as follows :

1. The Supreme Court of South Carolina erred in deciding that the third section of the Act of 15th September, 1868, entitled " An Act to close the operations of the Bank of the State of South Carolina," had the effect of annulling that portion of the eleventh section of the Act of 21st December, 1865, entitled " an Act to raise supplies for the year commencing in October, 1865," which directs the President and Directors of the Bank of the State of South Carolina " to collect the assets and property of the bank, and hold the same especially appropriated, first, to the payment of the principal and interest of the bonds known as the Fire Loan Bonds payable in Europe ; second, to the payment of principal and interest of the bonds known as the Fire Loan Bonds payable in the United States; and third, to the redemption of outstanding notes hitherto issued by said bank."

2. That said Court erred in deciding that the above recited provision of the Act of 1865 was in its character a mere *letter of instruction* from a principal to an agent, and *revocable* at the pleasure of the principal.

3. That even if said provision was in its nature revocable, the Court erred in deciding that the acceptance of the trust by the bank, and its action under said instructions for two years, with the assent of the preferred creditors thereto, and their *claim* under the same, evinced in their " answers " in this cause, together with the *litigation* in progress, had not, before the 15th September, 1868, constituted said creditors *cestuis que trust*, and converted the instructions otherwise revocable into an *irrevocable contract*.

4. That the Court erred in deciding that the *lien* created by the Act of 1838, did not attach to any portion of the assets and property in the hands of the receiver.

5. That the Court erred in deciding that if said *lien* did

attach to anything, the Fire Loan Bond and stockholders stood on an *equal footing* under the Act of 1838, in respect to such *lien*.

POINTS AND AUTHORITIES.

1. The "language" of the 11th section of the Act of 1865, referred to in the decision of the Supreme Court of South Carolina, it is submitted, evinces not merely "an assertion by the State of its proprietary rights," as claimed by the Chief Justice, but is a dedication of the assets and property of the bank to the purposes named.

In support of this view, we appeal to the language itself, connected with the fact that the Fire Loan Bondholders had, for near thirty years, been taught by the Legislature and the bank to look to the "assets and property of the bank," as "*pledged and set apart*" for their security.

See report of Investigating Committees of the Legislature, 1841, Bank Compilation. P. 251.

Resolutions passed by the Senate in 1846. Vide Bk. Comp., p. 87.

Report of President of the bank, 1843, Bk. Comp., 555, 566.

Report of President of the bank, 1847, Bk. Comp., 317.

2. When the "Legislature," as expressed by Chief Justice Moses, "not representing the sovereignty of the State, but in its capacity as sole stockholder," imposed upon the "President and Directors of the Bank" the duty of collecting and holding the "assets and property of the bank, especially appropriated to the payment" of the preferred creditors, and proclaimed the dedication in a public Act, the relation of TRUSTEE and *cestui que trust* between the President and Directors and the preferred creditors was at once established.

3. The Act proclaiming the dedication thus became a *contract in the nature of an assignment*—the *consideration* moving being the *indebtedness*, and the *assent* of preferred creditors being *presumed*.

4. A change of "legal title" was *not* necessary to *vest* in the *cestui que trust* their *equitable rights*, and once *vested*, the dedication was *irrevocable.*

The second, third, and fourth propositions are sustained by the following authorities :

(a) *As to rights of cestui que trust :*

Shubar and another vs. Winding, Cheves. L. R., p. 218.
Woodruff vs. Traprall, 10 Howard, 190.
Pemp vs. Dien, 10 How, 218.
Curran vs. State of Arkansas, 15 How.

(b) *As to presumption of assent :*

Burrill on assignments, p. 330.
Brooks vs. Marbury, 11 Wheat., 78, 97.
North vs. Turner, 9 Serg. & R., 224.
Lawrence vs. Davis, 3 McLean, 177.
Halsey, vs. Whitney, 4 Mason, 207, 214
Tompkins vs. Wheeler, 16, Pet. 118.
Nicol vs. Mumford, 4 John. Ch., 522, 529.
Cunningham vs. Freeborn, 11 Wend., 240, 24.
Ingram vs. Kirkpatrick, 6 Iredell's Eq., 462.
Evans vs. Lamar, 21 Ala., 333, 335.

(c) *As to consideration :*

Burrill on Assignments, p. 239.
Halsey vs. Whitney, 4 Mason, 206, 214.
Day vs. Dunham, 2 John. Ch. 16, 18.
Lawrence vs. Davis, 3 McLean, 177.

(d) *As to change of legal title.*

This was unnecessary, because the President and Directors were *already* the "*legal onwers.*" They held upon such *trusts* as their principal, the Legislature, chose to impose. The Act of 1865, directed them to hold upon *new trusts*, hence it did not change the "legal title," though certain *equitable rights*, quite as sacred as a *legal title*,

sprung up under it, and the *beneficial interest* became *irrevocably* fixed in the *cestui que trust*, and was enforcible through the Courts.

5. If the provisions of the 11th section of the Act of 1865 were originally revocable, for the want of expressed assent of the preferred creditors, the acceptance of the trust by the President and Directors, their action under it for more than two years, the acquiescence of the creditors, their claim and assertion of their rights in this case, (begun before 15th September, 1868, continued up to that time, and not yet closed,) prove conclusively that the revocation or repeal on 15th September, 1868, was "*too late.*" The rights of creditors had surely "*vested*" THEN, and a "*contract*" become complete.

The authorities declare that, "after the rights of creditors have once actually attached, or after notice of the assignment, to those provided for by it, or after notice by the creditors, to the assignee, of their desire and intention to avail themselves of the assignment, or after they have taken steps to enforce the trust, as by filing a bill praying for the distribution of the fund according to the provisions of the deed, and after any of the trusts have been actually executed, it is too late to revoke the assignment." Burrill on Assignments, p. 458.

Even in *England*, where assent of preferred creditors will not be presumed, it was decided, that where a deed of assignment has been executed to a stranger, as trustee for creditors, a *communication of the trust to a creditor*, by reason of which he may not have pursued his remedy, or his position may have been altered, will render the deed irrevocable by the assignor, without any actual assent of the creditor. Siggins vs. Evans, 32 Eng. L. & E. 139.

6. The fourth and fifth assignments of error would be irrelevant under the old practice, but as the effect of the Act of Congress of 1867 has not been determined, we present the following authorities in support of the proposition implied in the 4th assignment of error, namely: that by the lien created by the Act of 1838—the Bank and all its

property and assets were *pledged* in the pledge of "*profits*"—pledged *until the debt for which they stand as security is paid;* and that upon condition broken, the Court had authority to order a sale of the entire corpus.

Stewart and Garnet, 3 Sim. 398, (5th Eng. Cond. Ch. Rep.)

Inhabitants of Rehobath vs. Hunt, 1 Pick., 24.

Legard vs. Hodges, 3 Brown's Ch. 531 (S. C. 1 Ves. 447, and 4 Bro. Ch. 421.)

Phillips vs. Chamberlain, 4 Ves. 51.

This was the view taken by the Legislature of South Carolina for many years. One resolution reads:

"*Resolved*, That when the State of South Carolina pledged the *profits and capital* of the Bank to her creditors as security for money borrowed, she did so in honesty of purpose and good faith." See "Bank Compilation," 651, 652.

7. As to the 5th assignment of error, if, as the Supreme Court of South Carolina decides, the Fire Loan Stockholders are *not creditors* of the *Bank*, every presumption is against their holding a *lien* upon the *assets* of *the Bank*. The Bondholders are unquestionably creditors of the Bank, by reason of its endorsement on the bonds and the negotiations of Mr. McDuffie, the accredited agent of the Bank. Upon the faith of that *lien*, urged by said agent as an additional security for the debt, the loan was made. The dealings were direct and explicit between the bond creditors and the bank, and the whole transaction was part and parcel of the "arrangement" sanctioned by Mr. McDuffie. It was the action of the accredited agent of the bank and of the State, under the powers conferred by section 2 of the Act of 1838, *added* to the provisions of sections eleven and twelve, which perfected the lien claimed by the *bondholders*. When the stock was issued, the agency of Mr. McDuffie had ceased, and no similar "arrangements" and negotiations took place. The stockholders rely on the naked Act, under the first section of which the stock was issued.

If, in the case of the stock issued, a *lien* existed at all, it was intended only as a security to the *State*, and the State in 1865 had a right to waive this security, and did so to a certain extent by the Act of 1865.

H. H. Boyce

Of counsel for Baring Brothers & Co.,
Plaintiffs in Error.

H. P. Cooke & Co., Book and Job Printers, 52 Broad street, Charleston, S. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1873.

BARING BROTHERS & CO. AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

DABNEY, MORGAN & CO. AND OTHERS,
DEFENDANTS IN ERROR.

In error to the Supreme Court of the State of South Carolina.

Brief of Defendants in Error.

STATEMENT.

The present cause involves the question of the legal relations of the corporation known as "The President and Directors of the Bank of the State of South Carolina" to the several parties claiming to be the creditors of that corporation, and the mode and principles by which the assets of that corporation, now in the hands of a receiver appointed by the Circuit Court for Charleston County, shall be distributed.

In order to present these questions clearly it will be necessary to state the origin, character, and history of the bank, so far, at least, as may be useful in showing the origin and character of the several classes of claims now made against its assets.

The Bank of the State of South Carolina was incorporated by an act of the General Assembly of South Carolina passed December 19, 1812.

Stat. at Large, vol. 8, p. 24.

By the first section of this act a bank was established "in the name and on behalf of the State of South Carolina."

All the stock belonging to the State, of all descriptions whatsoever, whether six per cent. stock of the United States, three per cent. stock, loan office bonds, shares in the State Bank, and in the Planters' and Mechanics' Bank, and all bonds and notes due the State were made to constitute the capital of the bank, and were vested in the President and Directors and their successors.

All the unexpended money in the treasury of the State, and all the taxes to be collected were to be deposited in the bank to aid its operations, subject to all drafts by the State, authorized by legal appropriations.

All the stock in the possession of the State, purchased to meet the claims of Strickhuyson and Luxembourg against the State, was to be deposited in the bank, and the interest thereon to be received by the bank until the payment of said claims should be ordered by law.

The President and Directors were made a corporation and body politic, and the faith of the State was "pledged for the support of the bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency."

The bank was clothed with the usual corporate powers and privileges—to purchase, hold, and transfer property of all kinds; to sue and be sued; to adopt its own rules and by-laws; and to do all acts which might appertain to its functions as a bank; to issue notes, and to make loans, by way of discount, secured by mortgage.

By the 16th section of the act the bills or notes of the bank, originally made payable, or which shall have become

payable on demand, in gold or silver coin, were made receivable at the treasury of the State and by all tax collectors and other public officers in all payments for taxes or other moneys due to the State.

The whole capital of the bank was furnished by the State, who was thus the sole owner and stockholder therein.

By the 11th section of the charter of 1812 all the interest accruing from the stocks which constituted the capital of the bank, and all interest arising from loans and discounts, were to "constitute and be considered a part of the annual revenue of the State, subject to the pleasure of the Legislature."

And whatever part of such profits or interest should remain unexpended by the Legislature, as well as the principal of the United States stock, when paid, and all sums arising from the sale of any bank stock constituting part of the original capital of the bank, were to be considered and become part of the capital of the bank.

The original charter was made of force till May 1, 1835.

By various subsequent acts of the General Assembly, the capital of the bank was increased by the transfer of various public funds and moneys, and by the deposit, by requirements of law, of moneys held by any public officers of the State, received by them by virtue of their offices, or placed in their custody in suits pending, or under decrees of the courts of the State.

By an act passed December 20, 1821, (Stat. at Large, vol. 6, p. 165,) the bank was required to open an account in its books in which it should charge itself with the profits of the bank for the fiscal year 1822, and with all the future profits of the bank, which fund, with all its annual accumulations, was to be considered solemnly

pledged and set apart for the payment of the six per cent. stock previously issued by the State, and its final redemption; the fund so set apart was not to form any part of the capital of the bank, but was to be separately employed and banked upon like the capital of the bank.

The charter of the bank was renewed and extended in 1833, until May 1, 1856, together with all other acts of force relating to the bank.

Stat. at Large, vol. 8, p. 67.

And was again renewed and extended in December, 1852, until January 1, 1871.

Stat. at Large, vol. 12, p. 151.

The bank continued its operations under its charter and in conformity to the requirements of the Legislature till 1838.

In that year, under the pressure of the distress caused by an extensive fire in the city of Charleston, the Legislature passed an act entitled "An act for re-building the city of Charleston."

Stat. at Large, vol. 7, p. 156.

By the first section of this act the Governor was directed and required, in the name of the State, to issue bonds or other contracts, to be countersigned by the Comptroller General, not exceeding the sum of two millions of dollars: one million payable in twenty years, and one million in thirty years, with interest at six per cent., for the purpose of procuring a loan, on the credit of the State, to re-build the burnt portion of the city of Charleston; the bonds or contracts to be issued in such forms and for such amounts, and made payable at such places as should be most effectual in procuring the loan; and the faith and funds of the State were pledged for the punctual payment of the bonds or contracts with interest.

By the second section the Governor was directed to commission such agent or agents as the President and Directors of the bank should appoint, to receive the bonds or contracts, and to make all such arrangements as he might deem expedient for procuring the loan and placing the same to the credit of the State, subject to the order of the President of the bank.

By the third section the money, when realized in Charleston, was to be deposited in the Bank of the State of South Carolina, and become a part of the capital of the bank.

The remaining sections of this act which are of importance in the present case, are the 10th, 11th, and 12th, and are as follows:

SEC. X. "It shall be the duty of the President and Directors of the Bank of the State of South Carolina to make proper provisions for the punctual payment of the interest of such loan as may be effected *upon the credit of the State*, under the provisions of this act, and also for the ultimate payment of the principal thereof."

SEC. XI. "It shall be the duty of the President and Directors of the Bank of the State of South Carolina to cause to be opened in the books of the said bank an account in which they shall debit themselves with the profits arising out of the additional capital created out of the two millions loan aforesaid, for the year ending October 1, 1839, and with all the future profits of the said loan as the same shall hereafter be annually declared; which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on said loan and the final redemption thereof; and it shall be the duty of the President and Directors of the said bank annually to report to both branches of the Legislature the exact state of that fund."

SEC. XII. "When the profits of the said bank of the State of South Carolina shall have paid the interest of certain stocks for which they have been heretofore pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof."

It is admitted that, under this act, a large amount of bonds known as "Fire-loan" bonds were issued and negotiated mostly, if not wholly, in Europe, through the agency of Baring Brothers & Company, of London, who still represent that class of claimants in the present case; that the amount thus negotiated was originally £232,500, of which £123,500 were duly paid at the end of twenty years, in 1858; leaving about £109,000, payable in London, which became due at the end of thirty years, in 1868, but are still unpaid.

Record, p. 33.

The form of these bonds is set forth on pages 41 and 42 of the record.

It is further admitted that, under the same act of 1838, other certificates of State stock, payable at the State Treasury, were issued, of which about $318,000 are now outstanding.—(Record, p. 62.)

This stock is known as "Fire-loan" stock, and is represented in the present case by the plaintiffs in error, Maria Simons, J. V. Bowley, executrix, Edmund Bowley, and A. V. Dawson.

This stock is in form simply stock of the State of South Carolina, and bears no endorsement of the bank. It further contains on its face the declaration that it is issued under the authority of the *first* section of the act of 1838.

It is further established and admitted by the plaintiffs in error that the bank at the close of the war became insolvent.

Being insolvent and without hope of resuming its previous functions as a bank of issue and discount, the General Assembly passed an act December 21, 1865, entitled "An act to raise supplies for the year commencing

in October, 1865," by the 11th section of which it was enacted as follows:

SEC. 11. "That the President and Directors of the Bank of the State of South Carolina be, and they are hereby, authorized and required to close the branches and agencies of said bank, and that the principal bank at Charleston shall cease to be a bank of issue, but shall continue to act as a bank of deposit until further action of the Legislature; and the said President and Directors are hereby authorized and required to collect the assets and property of the bank and hold the same especially appropriated, first, to the payment of the principal and interest of the bonds known as the Fire-loan bonds payable in Europe; second, to the payment of the principal and interest of the Fire-loan bonds payable in the United States; and, third, to the redemption of outstanding notes hitherto issued by said bank."

In this condition of the affairs of the bank, and before the bank had actually carried into effect the scheme of the act of 1865, as to the distribution of its assets, Dabney, Morgan & Co., of New York, in their own behalf as owners and holders of bills of the bank, and of all others with them who shall properly come in, filed a bill in the Court of Equity of the State. The history of that case is fully stated on pages 71, 72, and 73 of the record in this case.

The cause was heard in the spring of 1870 in the Circuit Court for Charleston County, and the decree of the court was filed May 7th, 1870. This decree directs the payment from the assets of the bank, *first*, of the Fire-loan bondholders and the Fire-loan stockholders, principal and interest; or, if the assets be insufficient to pay the whole amount, then that they should be distributed ratably between these two classes of creditors. *Second.* If the assets be more than sufficient to pay the Fire-loan bondholders and Fire-loan stockholders, that the remaining assets be applied, *pro rata*, to the payment

of the billholders, the depositors, and other creditors of the bank.—(Record, p. 80.)

From this decree appeals were taken to the Supreme Court of the State by the holders of the bills of the bank, and the Baring Brothers & Co. as holders of the "Fire-loan" bonds. The President and Directors of the bank, and the State, also appealed from certain parts of the decree.

The judgment and decree of the Supreme Court was filed December 2, 1871.

By that decree so much of the circuit decree as gave a preference to the Fire-loan bondholders and Fire-loan stockholders in the distribution of the assets of the bank was set aside; the Fire-loan stockholders were held not to be creditors of the bank; the Fire-loan bondholders were held to be simple creditors, entitled to no preference, and having no lien upon the assets; the act of 1865 was held to be invalid and ineffectual as a distribution of the assets of the bank; the assets were ordered to be distributed among all the creditors of the bank in ratable proportion to the amount of their respective debts; the claims of the holders of the bills of the bank issued since December 20, 1860, were ordered to be reduced to their value in national currency; and the claims of depositors were also ordered to be reduced to their value in national currency.

The present writ of error is taken by the Baring Brothers & Co., representing "Fire-loan" bondholders, and Maria Simons and others, representing "Fire-loan" stockholders.

ARGUMENT.

It is assumed that in this court, as in the State courts, it will be contended by the counsel for the "Fire-loan" bondholders, that they are entitled to priority of payment over all other creditors of the bank, and by the counsel for the "Fire-loan" stockholders that they are entitled to an equal preference with the "Fire-loan" bondholders; or, failing in that, that they are at least entitled to rank as simple creditors of the bank; and that it will be contended by both these classes of claimants that their claims to priority of payment rest on the pledges contained in the 10th, 11th, and 12th sections of the act of 1838.

The object of this argument will be to sustain the decree of the Suprems Court of the State, by showing—

1st. That the "Fire-loan" bondholders are not preferred creditors of the bank, and have no lien on its assets, but are simple creditors only, entitled to rank with the other classes of creditors.

2d. That the "Fire-loan" stockholders are not creditors of the bank, and have no claim on its assets.

3d. That the holders of the bills of the bank and the depositors of the bank are creditors of the bank, and entitled to share ratably in the distribution of its assets, with the "Fire-loan" bondholders.

I. Although the State owned and controlled this bank from its creation to its close, the legal relations of the bank to its creditors, and of the creditors to the bank,

are precisely the same as if the bank had been the property of private stockholders.

U. S. Bank v. Planter's Bank of Ga., 9 Wheat., 904.
Briscoe v. Kentucky, 11 Peters, 257.
Curran v. Arkansas, 15 How., 304.

It is claimed on behalf of the "Fire-loan" bondholders and stockholders—that is, the holders of the bonds and stock issued under the act of 1838—that the provisions contained in the act of 1838, in the 10th, 11th, and 12th sections now quoted, constitute a pledge in legal effect of the present assets of the bank.

It is, therefore, necessary to examine carefully the provisions of those sections.

By the 10th section the bank is directed to make proper provision for the payment of the interest, and finally of the principal of the loan to be made.

By the 11th section the bank is directed to keep a separate account, in which the bank shall be charged with the "profits" arising from the loan made under the act of 1838, for the year 1839, and "with all the future *profits* of said loan"—"which said fund," namely, the *profits* before named, "shall be considered solemnly pledged and set apart for the payment of the interest on the said loan, and the final redemption thereof."

By the 12th section, the "profits" of the bank, after paying the interest of certain stocks for which they had before been pledged, were "pledged and set apart" for the same purpose.

So far as *the words* of this act go, this is a pledge and setting apart of nothing but the "profits" of the bank.

That the word "fund," employed in the 11th section has reference to the profits just before named, seems entirely clear.

The pledge, therefore, contained in the act of 1838, is a pledge of "profits" only.

The "Fire-loan" creditors have contended, however, that the pledge of "profits" is a pledge of that out of which profits arise; and hence, that the pledge of the "profits" of the "Fire-loan" capital of the bank, and subsequently of the other profits of the bank, is a pledge of all the property of the bank, including all the capital and the present assets of the bank.

It is not denied that a pledge may be created by written directions to hold property to meet a specified demand, or to devote to a stated and specified purpose the rents and issues of a particular estate.

It may be admitted that any contract in writing, by which, for a consideration, a person engages that another may have the income of either real or personal property, or the profits of stock or other moneyed investments, will amount in equity to a charge upon the property out of which the said income or profits are to arise.

The principle, however, which the "Fire-loan" creditors of the bank seek to apply here is, that a pledge of "profits" is, in itself, a pledge of that out of which the profits are to arise.

And the application sought to be made here of this doctrine goes to the extent of claiming that a pledge of the "profits" of the bank, is a pledge of all the property or assets of the bank, so that when profits cease to arise or to be received by the pledgee, the *corpus* itself, that is, the property and assets, must be sold and the proceeds paid to the pledgee under the pledge made to him of the simple "profits."

This claim of the "Fire-loan" creditors is rested wholly on the doctrine that a *devise* of rents and profits, is a devise of a fee simple in the land itself.

The cases cited in support of this position are—

1. *Stewart* v. *Garnet*, 3 Sim., 398.

In that case it was held, under a devise in the will of the testator of the *rents, issues and profits* of his estate to his two grandchildren in moieties, that as to the *real estate* the grandchildren would take a fee in the moiety devised to them.

2. *Town of Rehoboth* v. *Hunt*, 1 Pick., 224, where a vote of the income of *land* was held to be a grant.

3. *Allen* v. *Blackmire*, 2 Ves. & B., 74, where it is said that a *devise* of "profit" will pass land.

In the first of these cases the decision proceeded upon the ground that the devise was intended to convey the entire estate, there being no reservation or limitation, no special charge being put upon the estate, but a distinct devise made without limitation of time or extent to the devisee.

In each of the cases cited no other estate could ever arise to any one under the devise, because the entire beneficial interest was forever and unqualifiedly granted.

The courts, therefore, held that the devise of rents issues, or profits was in such cases a devise of the land itself or other property out of which the profits arose.

The plaintiffs in error have also cited the case of *Legard* v. *Hodges*, 3 Brown Ch., 531, where it was decided that a covenant of Hodges to set apart and appropriate a third part of the rents, &c., of his estate until £10,000 should be paid, was an equitable lien on that estate.

This case is authority for the position only that a pledge of rents is a charge upon the estate while that estate remains in existence or capable of yielding rents. But if the estate itself be lost, if no rents accrue—the only thing pledged—then this case is far from deciding that

the convenantee for *rents* may sell *the estate itself* and appropriate the proceeds to the payment of his claim for *rents*. His lien is a lien for rents, and nothing more. If no rents arise, if no fund representing rents exists, if no possibility of future rents exists, he cannot enlarge his right to *rents* so as to authorize him to lay hold of the estate and appropriate it under his lien.

Where the rents and issues are given only for a limited time, the rule that a fee is conveyed does not apply, for the reason of it ceases.

Earl v. Grim, 1 John. Ch., 499.

In all cases where the principle stated has been applied, it has been done in order to effectuate the intention of the instrument or contract under consideration.

In the present case, it is obvious that the Legislature, in the act of 1838, did not intend to give the "Fire-loan" creditors any absolute or unqualified estate in the capital or other property of the bank.

"Capital" and "profits" are carefully distinguished in the act of 1838.

The conclusion which we reach upon this branch of the case is, that the pledge of profits for a specified purpose and for a limited period, was in no sense a pledge of the estate itself, but only a charge upon that estate so long as it remained, or so long as profits could arise.

II. In order to determine whether the "Fire-loan" creditors have a lien in the present assets of the bank under the act of 1838, it becomes necessary to inquire next, of what the present assets consist, or what they represent?

If they do not represent "*profits*," then they are not covered by the lien or pledge of the act of 1838.

By the 11th section of the act of 1838, the bank was directed to keep a separate account of the profits arising

from the two millions of additional capital created under that act.

It appears, however, by the testimony of Mr. Waring, the cashier of the bank, and connected with it since 1838, that such an account was never kept.—(Record, pp. 66, 67 and 71.)

How, then, can it be said that the present assets are the result of, or represent, the "profits" pledged by the 11th section of the act of 1838? For, in order to sustain their present claim, the "Fire-loan" creditors are bound to show that the assets which they claim are what was pledged by the act of 1838. If this cannot be done their claim must fail.

But the 12th section of the act of 1838 contained a pledge of the profits of the bank generally, after the payment of certain obligations of the State for which they had been previously pledged, for the payment of the interest and redemption of the debt created by the act of 1838.

The question, therefore, arises, if the present assets of the bank do not represent the profits of the two millions of additional capital pledged by the 11th section, do they represent the general profits of the bank pledged by the 12th section?

It is conceded that the bank is insolvent. Its capital is, therefore, wholly gone. Nothing remains but the assets in question. On what ground can these assets be held to be profits? Have they ever been so considered by the Legislature?

As has already been shown, in 1821 the Legislature created a sinking fund, to be composed of all the profits of the bank from 1822 forward.

In 1852, (Stat. at Large, vol. 12, p. 150,) by act of the Legislature, the bank was directed "to carry the profits of the bank to the credit of the sinking fund, and to keep the account of that fund so as to show at all times what particular bonds, notes, stocks, and other securities belong to said fund."

No such account was ever kept, and it is in evidence that the sinking fund was banked upon like other capital, and its proceeds commingled with the other property of the bank.

Record, p. 67.

Report of Comp. General, 1831, Bank Compilation, 692.

Report of Bank President, 1843, Bank Compilation, 555.

Report of President, Reports and Res., 1863, pp. 72, 73.

If, therefore, the sinking fund represented the "profits" of the bank which, in the first instance, would have been included in the pledge of the act of 1838, how may we know that the present assets represent the sinking fund?

There is no evidence which warrants such a conclusion.

Mr. Waring, cashier, (record, p. 67,) says he understood that the present assets were the investments made from the sinking fund. But this is only his opinion or understanding. No one pretends to point out any single bond, stock, note, or other security, as a part of, or as the result of, the investment of the profits of the bank.

That the sinking fund, if it were in any way traceable, might represent "profits," and thus be a fund which the pledge of 1838 might cover, may be admitted; but the difficulty remains, that there is no means of knowing upon that hypothesis from what sources the present assets arose—whether from investments of capital or investments of profits.

Mr. Waring, cashier, says, on page 68 of the record, that he cannot trace the investments of the sinking fund, and that there is no book or account in the bank which shows how the surplus fund each year was invested.

The fund, therefore, applicable to the lien or pledge of 1838 cannot be pointed out, and until this is done no specific lien on this specific property can be enforced.

III. We come now to consider the more general, as well as more decisive question—What do the assets of an insolvent bank represent? Or, to put the question more specifically, Do they represent in any sense "profits?"

What are profits? What does the term import?

A sound definition is found in 1 Lindley on Partnership, 695, where it is said that the word profit presupposes an excess of the value of returns over the value of advances.

If the exact amount advanced is returned there is no loss nor profit. If less, there is loss. If more, profit.

If in the transactions of a year or a series of years, a certain amount of capital is advanced and employed, which is invested in property of various kinds; and if, concurrently with this, liabilities are incurred, and if the amount of these liabilities at any given time is found to exceed the value of the capital invested, or the value of the property in which that capital then exists, how can there still be said to be *profits?*

There is a certain sense in which there may be said to have been profits. Particular transactions may have been largely profitable. Particular years of business may have resulted in profits; but if, at the winding up of a whole

business there is insolvency—which means an insufficiency of property to pay liabilities—what is there that may be pointed to as "profits?"

The argument has sometimes been urged in this case, that when, as in case of insolvency, the capital is lost, what remains must be profits.

But when it is said, as was said by Mr. Justice Curtis, of this court, in *Curran* v. *Arkansas*. 15 Howard, 304, that when a bank becomes insolvent it has lost all its capital, it is not meant that that capital nowhere exists, but only that it is lost *to the stockholders*. And such is the sense in which the doctrine is applied in the case of *Curran* v. *Arkansas*.

The capital still exists in the form of any assets which the bank may possess; but these assets are, in cases of insolvency, *ex vi termini*, less than the debts. The debts will exhaust the assets and leave a deficiency.

To speak of *profits* in such a case is to misconceive the meaning of words.

If at any previous period there were profits which were again employed as capital, and the result at the end is insolvency, it may be that some part of the remaining assets are the result of the previous profits; but how does that fact alter the other fact, that at the time when the assets are to be disposed of, there has been a loss, not only of all profits previously made, but of all the capital, so that the entire assets fail to pay the debts?

If there were a pledge of the profits of the business, it might be that that pledge would cover any specific asset which could be pointed out as the representative of profits previously made; but unless this can be done, the assets represent simply what remains of all that was invested, the entire capital of whatever kind, and not *profits*.

Such is the condition of this Bank of the State of South Carolina. Whatever it has heretofore had to do

business with, to bank upon, all its capital, is gone, so far as its sole stockholder is concerned, and that capital exists only in the form of assets, unequal in amount to the debts it owes.

Certain creditors of the State had a pledge of the *profits* of this bank, but now when they seek to assert that pledge, there are no profits in existence, and nothing which can be pointed out as the result of the profits of former years.

"In ascertaining the profits of a business, the value of the partnership property is to be found, and the original capital, with interest thereon, if necessary, is to be deducted. The residue will represent the profits."

Dinham v. Bradford, 5 L. R., 519, Ch. Appeal Cases.

The value of the property here is the value of the assets, which is all the bank can now show for the capital advanced and for whatever else she has had from any source to bank upon, whether from the issue of bills, the moneys of depositors, or moneys received from any other source. Her debts exceed the entire amount of her assets, and yet she is said to have *profits* to be covered by the pledge of 1838!

"If," says the Supreme Court of South Carolina, "A invests $10,000 in trade, and in winding up his affairs finds that he owes $15,000, and has assets in value equal to only $5,000, the fund which constituted the capital of the business is exhausted, although the assets on hand were derived from the operations in which it was employed. We should, however, be rather inclined to the conclusion that they represented the money of his creditors which had been used in their acquisition. * * * In no sense can they be considered the profits of the bank." —(Record, p. 92.)

But it has been urged in this case that the State has from time to time withdrawn large amounts from the profits of the bank, equal in amount to more than the entire capital advanced, with seven per cent. interest. There is testimony to this effect on page 62 of the record.

But how does that affect the present question? The present question is not of the liability of the *State*, but of the disposition of the assets of *the bank*.

To show that large profits have been received by the State does not tend to show that these present assets are profits.

If the State has withdrawn profits of the bank which were pledged by the act of 1838, and if by that action of the State the pledgees under the act of 1838 are now deprived of their security, no court can transfer that pledge to other property of the bank and exclude other simple creditors of the bank from assets in which, otherwise, they would have had a good claim to share ratably.

The ultimate liability of the State for all the debts of the bank is conceded on all hands, and her liability for profits previously withdrawn from under the pledge of 1838 may be conceded, but that will not substitute other funds of the bank in place of those improperly withdrawn by the State.

The just claims of other creditors cannot be postponed to make good to the "Fire-loan" creditors their losses from the direct action of the State.

Our conclusion is that there is no view in which the "Fire-loan" creditors can be held to have a specific lien on the present assets of the bank under the act of 1838.

IV. We have thus far considered the act of 1838 in its relations to the entire "Fire-loan" debt—the "Fire-loan" bondholders represented by Baring Brothers & Company, and the "Fire-loan" stockholders represented by the other plaintiffs in error.

The next question is, Is there a difference between these two classes in respect to their claims upon these assets?

We have maintained that neither of these two classes of creditors have any lien or prior claim upon the assets. So far they stand on a level.

We now maintain that there is a difference between these two classes of cases, which consists in this: that the "Fire-loan" bondholders, by reason of the guaranty by the bank endorsed on their bonds, became creditors of the bank, and are entitled to take alike with the other creditors of the bank, and that the "Fire-loan" stockholders, having no such guaranty, are creditors of the State only, and not of the bank.

The court has already heard the terms of this guaranty.

It was competent for the bank to make this guaranty under the powers conferred by its charter. As the Supreme Court of South Carolina has said "it was competent for the bank to incur an obligation in the course of its legitimate business. It was incident to its powers as a body politic to enter into contracts not inconsistent with the purposes for which it was organized, unless forbidden by its charter."

Record, p. 92,

In the matter of this guaranty the bank was acting within its chartered powers. The loan was to increase its own capital, and the act of 1838 plainly contemplated the active agency of the bank in procuring the loan.

But in the case of the "Fire-loan" stock there is no such guaranty.

It purports on its face to be issued only under the first section of the act of 1838.

That section simply authorizes a "loan in the name of said State," and pledges "the faith and funds of the State for the payment of the loan."

The pledge of the profits of the bank is contained in sections 11 and 12.

Upon this point the Supreme Court of South Carolina say: "We have already said that, in our judgment, the holders of the 'Fire-loan' stock were in no way creditors of the bank, while they are creditors of the State. The assets of the corporation must be held first applicable to the payment of its own creditors. * * * The difficulty with those who hold that portion of the loan which was issued in the form of stock is that they have no contract with the bank. It never guaranteed the payment of the stock, which, though a "contract" under the act, entered into by the Governor on behalf of the State, imposed no liability on the ~~State~~ Bank."

Record, pp. 93, 95.

V. But the plaintiffs in error, if their claim to be the holders of a specific and prior lien on these assets is not allowed, make a further claim under the 11th section of the act of 1865, already quoted.

This claim can only enure, if sustained, to the benefit of the "Fire-loan" *bondholders*, since the amount of their claim, if they are held to be preferred creditors, will be more than sufficient to exhaust the assets. And it is, therefore, assumed that the claim will be urged only in behalf of the holders of the "Fire-loan" bonds, represented by Baring Brothers & Company.

The 11th section of the act of 1865, after directing that the branches and agencies of the bank shall be closed and the bank cease to be a bank of issue, requires the President and Directors "to collect the assets and property of the bank and hold the same specially appropriated, *First*, to the payment of the principal and interest of the bonds known as 'Fire-loan' bonds, payable in Europe; *Second*, to the principal and interest of the 'Fire-loan' bonds payable in the United States; and *Third*, to the redemption of the outstanding notes hitherto issued by the bank."

This section, it is urged, is a statutory assignment of the assets of an insolvent corporation, creating preferences among its creditors, which was within the power of the Legislature, and which became and is an irrevocable contract between the bank and the creditors so preferred, which no subsequent legislation can impair or change.

The act of 1868, entitled "An act to close the operations of the Bank of the State of South Carolina," 14 Stat. at Large, p. 22, by its ~~11th~~ section expressly repeals the 11th section of the act of 1865.

The question, therefore, is, of the effect of the 11th section of the act of 1865 on the assets of the bank, and of the validity of the subsequent repeal of that section by the act of 1868.

For the purposes of this argument it may be conceded that the State, in passing the 11th section of the act of 1865, acted in the capacity of sole stockholder, and that the act of 1865 has the same effect as a similar resolution of the body of stockholders of a private bank would have.

It may be further conceded that a preference, if fair and honest, may be given by an insolvent person or corporation, to certain creditors, to the exclusion of other creditors.

A corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may, by virtue of its general power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made *bona fide* for the payment of its debts.

Abbott's Dig. Law of Corp. and cases there cited.
Angell & A. on Corp., 155, 156.

Does the act of 1865 amount, in a legal sense, to an assignment of the assets of the bank?

In the first place, the title to this property was in the bank, and not in the State.

The State, though the sole stockholder, was not the corporation, nor the legal owner of the assets and property of the corporation.

The act of 1865 could not, therefore, operate of its own force to effect an assignment, because the legal title being in the corporation it would require the action of the corporation to effect a transfer or change of that title to the creditors.

If it was intended to be an assignment, it could not be so in legal contemplation without the action of the bank itself.

An assignment, when once it takes effect, changes the legal title and ownership of the property. It passes by the assignment, *ex vi termini*, from the ownership of the assignor to that of the assignee.

Inasmuch, then, as the legal title was never in the State, no act of the Legislature could of itself work an assignment or change of ownership. The title must pass from the one who holds it.

To whatever extent the State was virtually or practically the bank, she was not and could not be the bank, in the eye of the law.

The corporation known as the "President and Directors" of this bank, as a legal entity, was as separate and distinct from the State of South Carolina as any other corporation ever chartered by that State. It was the necessity of this legal separation—the constitutional inhibition of the States from issuing "bills of credit"—which led to the device of setting up State Banks, to be owned and controlled by the State, but still to be separate and distinct corporations in legal contemplation.

The State, then, not having the legal title or ownership of these assets, the act of 1865 could not be an assign-

ment. It could at most be no more than a direction to the bank to make an assignment.

Has the bank ever made an assignment?

It is not pretended.

Has anything been done looking to a change of ownership, under the act of 1865?

Nothing.

The bank proceeded to collect her assets and to hold them. Nothing was done either by the bank or the creditors, who claim the preference under that act, to pass the title or change the ownership of these assets.

It is true that the bank regarded the act of 1865 as a law for its guidance, and would have proceeded, if the act had remained unrepealed, or if the courts had not intervened, to distribute the funds according to that act, but that does not render the act in any sense an assignment.

But this whole idea that the act of 1865 is an absolute assignment is purely the result of a construction of the language and meaning of the act of 1865.

It cannot be pretended that there is any evidence anywhere, outside the words of the statute, which suggests or sanctions the position taken.

Do the words of the act of 1865 support the idea of an absolute assignment?

Is there anything in the language employed which shows an intention to change the legal ownership of the assets?

"Collect and hold specially appropriated," is the language used.

Does such language import a change of title?

As is said by the Supreme Court of the State, "It was but the assertion by the State of 'its proprietary rights over the assets,' and was not in design or effect a contract with the fire-loan bond or stockholders."

But there is another objection to the act of 1865.

If our argument, and the decision of the Supreme Court, is correct, the "Fire-loan" stockholders having no guaranty by the bank of their stock, are not creditors of the bank.

The act of 1865, so far as it attempts to apply any portion of these assets to the payment of the "Fire-loan" stock, is, consequently, an attempt to divert the funds, which are only applicable to the payment of the creditors of the bank.

That this cannot be done by the State as sole stockholder, any more than by the body of private stockholders, has been emphatically held by this court in *Curran* v. *Arkansas*, 15 Howard, 304, and again in *Railroad Company* v. *Howard*, 7 Wall., 409.

The act of 1865 was no more than a legislative direction to the bank, binding while it continued, but, like any other unexecuted purpose or unpaid appropriation, liable to be repealed by the legislative power at its pleasure.

It was repealed by the act of 1868, already cited.

D. H. CHAMBERLAIN,
Of Counsel for Defendants in Error.

Supreme Court of the United States,

DECEMBER TERM—1872.

BARING BROTHERS & CO., ET AL.,
PLAINTIFFS IN ERROR, VS.
DABNEY, MORGAN & CO., ET AL,
DEFENDANTS IN ERROR.
} No. 364., (No. 153.,)

ISAAC W. HAYNE. FOR BARING BROTHERS & CO.,
Plaintiffs in Error.

This case comes up upon writ of error, directed to the Supreme Court of South Carolina, the highest court of Law and Equity in said State.

The petition of Baring Brothers & Co., Maria Simmons and others, defendants in the Court below, praying that writ of error should issue, states that the complainants in the Court below sought to set aside the eleventh section of an Act entitled "An Act to raise supplies for the year commencing in October, 1865," passed by the General Assembly of said State December 21st, 1865; that said Act had been accepted and acted on by the corporation known as "The President and Directors of the Bank of the State of South Carolina," and had been accepted by the house of Baring Brothers & Co., and claimed as a *contract*, anterior to the passage, in 1868, by the same General Assembly, of an Act *repealing* the said eleventh section of the said Act of 1865; that the *validity of the Repealing Act* was drawn in question, and its validity sustained by the said Supreme Court, and that petitioners had interposed paragraph 1, section 10, of Article I, of the Constitution of the United States, and prayed writ of error accordingly, which was granted. (P. 102 of Transcript.)

Chief Justice Moses, in delivering the opinion of the Supreme Court of South Carolina, states clearly the point which gives jurisdiction to this Court. He says:

"The bondholders claim that the 11th Section of the Act of 1865, 13 S. L., 267, is in itself a valid assignment of the effects of an insolvent debtor, and that by its terms they have a preference to the said assets. * * * The said Section, after directing that the branches and agencies shall be closed, and that the principal Bank at Charleston shall cease to be a Bank of issue, authorizes and requires the President and Directors "to collect the assets and property of the Bank, and hold the same specially appropriated,' 'First, to the payment of the principal and interest of the bonds known as the Fire Loan, payable in Europe. Second, to the principal and interest of the Fire Loan Bonds, payable in United States; and third, to the redemption of outstanding notes hitherto issued by said Bank."

"The legal title to the property of the Bank was in the corporate body, the President and Directors. The sole stockholder is the State itself. The property, if not bound by a valid lien, may be disposed of by the Bank in its corporate capacity. It is, however, but the agent of the stockholder, bound to execute his directions in the disposition of the fund which it holds, by and under his appointment. A corporation has the same right to deal with its property, through a conveyance, whether by actual sale, or assignment, for the benefit of creditors, as an individual has. It is a right incident to ownership, and its exercise is not trammelled with any other conditions or restrictions than those which the law imposes. A preference, if fair and honest, may be given by an insolvent person to one creditor, to the exclusion of all others, and this right is not denied to a corporation, though without means to meet all its liabilities. 'A corporation, unless restricted by its charter, or prevented by the operation of some bankrupt, or insolvent law, may, by virtue of its general power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made *bona fide* for the payment of its debts.' *Abbott's Dig. Law of Corp.*, cases there cited. *Angell & Ames on Corp.*, 155 and 156. Is

the Act of 1865 such an assignment as conferred a vested right on the creditors which it proposed to prefer, and therefore irrevocable on the part of the State, the sole stockholder of the corporation? If it amounts, as contended, to a statutory assignment which transferred the assets from the State to the creditors in the order prescribed, then the creditors took a vested interest, beyond the power of a subsequent Legislature, either as to repeal or modification. If the fund had been transferred by the agent to the hands or dominion of the creditor, such transfer would have operated to change the ownership, and the power over it would have passed from the principal. Before, however, any express act of transfer or change of control, the mere expression of willingness on the part of the creditor to accept the disposition intended by the principal would not so affect the relation of the principal to the fund as to deprive him of all power over it. While in the hands of the agent, unless affected by words sufficient to create a vested right, it is within the discretion of the principal to revoke the order for its disposition, or entirely to recall it. In *Story on Agency*, Section 465, where the author treats of the Revocation of Authority to an agent, it is said: 'So if it has been in part put in the course of execution, but not to such an extent as to become obligatory between the parties, as if preliminary proceedings only have been instituted.' From the passage of the Act, to March 3d, 1868, the date of the injunction granted in this case, no action was taken by the President and Directors, which changed the legal or beneficial interest in the fund, nor up to that time was there such an acceptance of its provisions on the part of the creditors, proposed to be preferred by it, which amounted to a contract that would preclude the State from farther intervention between them and the Bank in the administration of the said assets. The Act of September, 1868, 14 S. L., 22, by its 11th Section, in express terms repealed the said Section of the Act of 1865, and unless it can be held to have vested a right, or constituted a con-

tract on the part of the State, with the creditors named in it, it was within the power of the Legislature, not representing the sovereignty of the State, but in its capacity as sole stockholder, to revoke the authority to its agent, to perform such an act, which, while it remained unexecuted, did not change its control over the property to which it referred." (Pp. 93, 94.)

It will be observed that no exception is taken by the Court to the *form* of the Act of 1865. The Supreme Court of South Carolina *assumes* the validity of the Act for the purpose intended. It *asserts* that the corporation had the same right to assign its property for the benefit of creditors, with or without preferences, which at that time, (there being no bankrupt law or other statute forbidding,) belonged to individuals. The Court *asserts* that the State, being the sole stockholder in this Bank, the *Legislature* had the power to *direct* and *control* "the President and Directors of the Bank;" that it, (the Legislature,) stood to the Bank in the relation of *principal* to an *agent*, and that the expressed will of the former was binding on the latter. It *assumes* that the expression of the will of the Legislature through this eleventh section of the Act of 1865, was valid and effective, *until* repealed by the Act of 1868. The decision hinges on the argument that the Act of 1865 was *in its nature revocable*, and that *nothing* intervening between the passage of the Act of 1865 and the attempted revocation on the 15th September, 1868, *had changed the relation of the parties.*

We claim on the part of the Fire Loan Bondholders:

1st. That the direction given to the President and Directors of the Bank in the Act of 1865, passed by the Legislature, approved by the Governor, and published to the world, was not only immediately binding on the *Bank*, but *vested rights* in the *preferred creditors*, and at once became *irrevocable.*

2d. That if not irrevocable from the beginning, it had

become irrevocable before the passage of the Repealing Act, September 15th, 1868, *by reason of the action of the parties*.

The first proposition is matter of law, the second of mixed fact and law.

Chief Justice Moses is not without authority for the legal position he asserts as to the revocable character of a conveyance to which the creditors are not parties. In the case of *Smith* vs. *Keating*, in the Exchequer Chamber, 6 M. Gr. & Scott, it was held, that "when a debtor conveys property in trust for creditors to whom the conveyance is not communicated, and the creditors are not in any way privy to it, the conveyance operates not as an assignment, but as a power to the trustee, which is revocable by the debtor." *Burrill on Assignments*, Chap. 56, p. 338, citing the above case and several other *English* cases, sums up by stating that "in *England* it has been settled that the assent, or at least the privity of creditors to an assignment in trust for their benefit, is essential to render it operative in their behalf." Such instruments "*in England*" are treated as *revocable "deeds of agency."*

But, with all due deference, it is submitted that in *America*, it is equally well settled that the expressed assent of the creditor is *not* essential. "If the trust be for his benefit, the law *presumes* his assent to it, until the contrary is shown." *Burrill on Assignments*, p. 330. Chief Justice Marshall in *Brooks* vs. *Marbury*, says, "Deeds of trust are often made for the benefit of persons who are absent, and some for persons not in being. Whether they are for the *payment of money*, or any other purpose, no *expression of assent of the persons for whose benefit they are made* has ever been required as preliminary to the *vesting* of the estate." 11 Wheat. 78, 97.

In Pennsylvania it has been decided that the "assent of absent persons to an assignment will be *presumed*, until their dissent be expressed, if it be made for a valuable consideration, and beneficial to them." *North* vs. *Turner*, 9

Serg & Rawle, 224. Justice McLean in the case of *Lawrence* vs. *Davis*, observes that "that which purports to have been done for the benefit of creditors, and which was manifestly for their advantage, will be *presumed* to have been done with their assent, unless the contrary appear." 3 McLean, 177. See also *Halsey* vs. *Whitney*, decision by Judge Story, 4 Mason, 206, and *Tompkins* vs. *Wheeler*, 16 Pet. 118.

Burrill on Assignments (p. 332) states that "in New York it has long been settled that it is not necessary to the validity of an assignment in trust for the benefit of creditors, that the creditors should be parties to it, or signify their assent, and it makes no difference in this respect whether the assignment be with preferences or without." See *Nicol* vs. *Mumford*, 4 Johns. Ch. 522, 529, and *Cunningham* vs. *Freeborn*, 11 Wend. 240, 248.

In North Carolina the same rule is adopted, Ch. Justice Ruffin placing it on the ground of "the intrinsic soundness of the principle, the prevalent impression in the profession, and the course of the adjudications in the United States.," *Ingram* vs. *Kirkpatrick*, 6 Iredell's Eq. 462.

In Alabama there are numerous decisions to the same effect. Judge Lyon, in *Evans vs. Lamar*, 21 Ala,, 333. 335, says, "where the deed is absolute in its terms, and conveys property to the trustee for the benefit of certain specified creditors, who have not executed it, but whose debts are not postponed beyond their maturity, the assent of the creditors will be *presumed*, and the deed is *not* a mere power, but will be regarded as a valid and operative conveyance."

In Kentucky the same rule prevails. 6 B. Monroe, 252, and 3 B. Mon. 218. The same in Michigan, Georgia, Tennessee, Missouri and Rhode Island.

These authorities seem fully to warrant the conclusion expressed in *Burrill on Assignments*, chap. 34, p. 458. "In the *United States*, where, as a *general rule*, the assent of creditors, or their union as parties to the assignment is *not* necessary to its validity, the *prevailing doctrine* is that an

assignment in trust for creditors, executed and delivered by the assignor, and accepted by the assignee, creates at once the relation of Trustee and *cestui que trust* between the assignee and the creditors, and *cannot be revoked* by the assignor, or annulled by the joint act of the assignor and assignee."

The decision of the Supreme Court of the United States, already cited, is here the highest authority. Next in authority to the decisions of this Court, in a case arising upon writ of error, directed to the Supreme Court of South Carolina, are the decisions of the highest Courts of that State. I shall presently shew that South Carolina has hitherto gone to the full extent of the doctrine contended for. In *Dargan vs Richardson*, Cheves L. Rep., p. 197, it was held that an assignment *by letter*, of goods, to indemnify one who had paid money as security, was good against creditors attaching *before the letter was received or the assignment accepted, and took effect from its date.* In *Shubar and another*, vs. *Winding*, Cheves' L. Rep., p. 218, the issue arose on a return of a garnishee, in whose hands certain assets had been attached as the effects of Winding, the absent debtor. The garnishee claimed property in the assets for himself and other creditors, and relied on the following letter from Winding, which had accompanied the notes and accounts when they were placed in his hands.

"The enclosed notes and accounts are all good, and out of them I wish you to pay yourself $78, Joseph Ward about $60, the balance of Dr. H's account to G. & B., and the balance to C. Gist. It may take you a little time before you can see these people, but I know it is good, and can do no better" The Court say, "We are all of opinion that the letter transmitting the securities to Gray was a *valid assignment of them* to him and the other creditors. * * After the receipt of the letter, the Act was *irrevocable* on his (the debtor's) part, and *vested property* in Gray for himself, and *in trust for the others.* Indeed after he had accepted the trust, and had acted upon it by collecting the

money, he assumed an *agency for the others*, which I think would raise an assumpsit, and enable them to maintain an action against him for money had and received. The case of *Dargan vs. Richardson*, held such a letter to be a valid assignment *from its date*, and *without delivery* of the property. * * If good as an assignment to Gray, as it clearly was, according to *Dargan* vs. *R.*, it was *equally effectual to vest property in other creditors*, for whose benefit the securities were transmitted to him, as well as for his own." Without multiplying authorities from South Carolina, we assert that, until the decision now under review, no State has gone further in the doctrine that the consent of the creditors, benefitted by an assignment, will always be *presumed* until the contrary is made to appear.

But Chief Justice Moses relies on the fact that there is nothing "in the language employed in the Statute which denotes an intention to change the *legal* ownership." P. 94. Certainly not, because "the President and Directors of the Bank of the State of South Carolina" were *already* the "legal owners," without, however, any beneficial interest in the assets. They held as agents, servants, creatures of the General Assembly, and upon such *trusts* as their principal chose to impose. The Legislature, which it is considered by the Ch. J., had the right to direct the distribution of the assets among the creditors of the corporation, chose, in so doing, to retain the same trustees, but to direct them to hold upon *new trusts*. The "legal title," it is true, had not changed, but the *beneficial interest* had become *irrevocably* fixed in the *cestui que trust*. New rights had sprung up, which were enforcible through the Courts—*equitable rights*, quite as sacred as a *legal title*. The case of *Curran* vs. *the Bank of Arkansas*, 15 How. 524, and all that class of cases recognized in the case of the *State ex relatione the Attorney General of South Carolina vs. the President and Directors of the Bank of the Sate of South Carolina*, (the subject matter of which were these very assets,) are based on the principle that the obligation to creditors, imposed

upon a trustee by the Legislature, constitutes a *contract*—a contract with the *cestui que trust*—which contract cannot be impaired by the Act of any subsequent Legislature. Baring Brothers & Co., are claiming, before a Court of Equity, the equitable rights conferred by the Legislature, "not," as the Chief Justice expresses it, "representing the sovereignty of the State, but in its capacity as sole stockholder." What manner of difference could result so far as these rights are concerned, from the fact that the "sole stockholder" chose to act through the accustomed agent, instead of selecting a new one? In this peculiar case there was no necessity for a change in the *legal title*. It was enough that the *beneficial interest* vested in the preferred creditors, which we think it unquestionably did. It may be that a *technical* "assignment" requires a change of the legal title. This it is not necessary to discuss. It is claimed that the direction of the Legislature to "the President and Directors of the Bank of the State," (the State being the sole stockholder,) "to hold the assets and property of the Bank specially appropriated" to certain preferred creditors, *vests* certain interests in the creditors, which the law protects. We think it is a contract in the nature of an "*assignment*;" but let the Chief Justice call it by what name he will, it is a *contract*, and the most apt analogies in the law books will be found under the head of "assignments."

The Chief Justice refers to the "language of the Statute," as evincing merely an assertion by the State "of its proprietary rights over the assets." If this were all, it was a cruel sporting with the hopes and expectations of the preferred creditors. Baring Brothers & Co. had been taught, for near thirty years, to believe that this Bank, its capital and profits, was pledged for the payment of the Fire Loan debt. This debt had been reported upon, considered and discussed every year throughout this time. The Bank had, until the war cut off communication, regularly paid the interest on the Fire Loan Bonds through the Barings, and

at their Banking House. All parties in the State had concurred in referring to this debt as one peculiarly sacred, and which *must* be paid. A crash comes. The Bank, which for twenty-seven years the Barings had been taught to rely upon, becomes hopelessly insolvent, and the State itself in such extremity that no promise could be held out that the Fire Loan Bonds, which were to become due in two and a half years, could be paid at maturity. The Legislature assembles, declares by solemn act, published in the Statutes at Large, that the Bank shall "cease to be a bank of issue," and commands the President and Directors "to collect the assets and property of the bank, and hold the same specially appropriated," 1st, to Fire Loan bondholders, payable in Europe, 2d, to Fire Loan bondholders, payable in America, and 3d, to bill holders. Yet the language of this Statute, passed under such circumstances, is said to evince "merely an assertion by the State of its proprietory rights over the assets!"

The Act appears to me far more like a permanent and final disposition of an insolvent's effects, and no shadow of intent appears, which I can perceive, to reserve to the State a power of revocation. The Legislature of 1865 never dreamed of such a "paltering with words in a double sense." It was intended, as it purports to do, as a provision for the certain payment of at least one honest debt, and was so considered by the Legislature of 1866, and was so understood by the Military Government of 1867. When Judge Magrath filed his bill in this case, in October, 1867, he did not claim that the act of '65 was revocable, or that it conveyed inchoate rights. He attacked it as unconstitutional, being, as he urged, in contravention of the original charter of the Bank, and of the Bankrupt Act of Congress, just then passed. It was reserved to the reconstructed Legislature of 1868 to see new light.

The Act passed 15th September, 1868, containing the repeal of the Eleventh Section of the Act of 1865, in full, is as follows :

"AN ACT

TO CLOSE THE OPERATIONS OF THE BANK OF THE STATE OF SOUTH CAROLINA.

Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Governor of the State, is hereby authorized and required, for and on behalf of the State, to take possession of all the real and personal estate, assets, choses in action, and books of accounts of the corporation known as "The President and Directors of the Bank of the State of South Carolina," in whose hands soever found, and sell at public auction, at such times, and upon such terms as he shall deem most advantageous to the State, all the real and personal estate, stocks, bonds of the corporation, and other assets of the said corporation, and the personal bonds, notes and bills of exchange owned by said corporation; and all debts and choses in action due the said corporation, he shall place in the hands of the Attorney General of the State, with instructions to institute, in the name of the said corporation, legal proceedings to collect the amounts so due as speedily as possible; and the proceeds of said sales, and of all collections made by the Attorney General, shall be deposited in the Treasury of the State, subject to the order of the Governor, who shall keep a distinct account thereof, separate and distinct from the other accounts of the State, and shall report the same to the next succeeding session of the Legislature: *Provided, always*, That suits shall not be instituted upon any debts which, in the opinion of the Governor and Attorney General, are valueless.

Section 2. That all bills issued by said corporation prior to the twentieth day of December, 1860, be funded, and on the surrender and delivery of said bills to the Treasurer of the State, bonds of the State, payable within twenty years after date, with interest at 6 per cent. per annum, payable semi-annually, at the Agency of the State in the

city of New York, and the interest of said bonds the credit and faith of the State is hereby pledged: *Provided, also*, That said bonds shall not be presented to the billholders, and executed before January 1, 1869.

Section 3. That the eleventh (11) Section of the Act of the General Assembly of the State, ratified the 21st day of December, 1865, entitled "An Act to raise supplies for the year commencing in October, 1865," be and the same is hereby repealed.

Section 4. That the sixteenth section of the Act ratified the 19th day of December, 1812, entitled "An Act to establish a bank on behalf of, and for the benefit of the State," and all Acts and parts of Acts which render the bills of said corporation receivable in payment of taxes and all other debts due the State, be and the same are hereby repealed.

Section 5. The Governor of the State of South Carolina is hereby authorized to pay all expenses necessary to carry into effect the provisions of this Act out of any funds in the State Treasury not otherwise appropriated.

Section 6. All bonds or stocks authorized in this Act, or hereafter to be authorized, shall be of uniform character in design; and to secure this result, the Financial Agent in New York shall make all necessary arrangements for the same."

The first section of this Act has already been pronounced by the Supreme Court of South Carolina, unconstitutional. The second has been carried into effect, and if the bills surrendered have really been destroyed, there are but few bills of the character designated still extant. But there is the rub. The Act itself does not provide for their destruction, or for their safe keeping. Section 3 repeals the eleventh section of the Act of 1865, Section 4 repeals the sixteenth section of the charter, and all Acts making bills of the Bank receivable in taxes, and is at least of questionable constitutionality.

Other creditors than billholders, are neither named, or alluded to in the Act. The Fire Loan Bonds had matured 1st July pevious. The last coupon upon them, as well as the principal, remained unpaid, and unprovided for, except through the Act of 1865, whose operation had been temporarily suspended by the injunction in this case, and was now repealed. With principal and interest thus unpaid and otherwise unprovided for, the Legislature (but for the repeal of the only attempt at provision for payment,) seem to have *ignored* the existence of this debt altogether. And principal and accumulated interest have remained unpaid, and the debt ignored to this day.

Burrill on Assignments at p. 239, Chap. 15, says, "there can be no question whether the assignment of a debtor's property to a trustee for the benefit of his creditors, is for a valuable consideration or not, because the debts due to the creditors constitute a valuable consideration in the highest sense of the term." Judge Story, Ch. Kent and Justice McLean, are cited as fully sustaining the doctrine. The moving consideration is the indebtedness, and the parties chiefly interested are the debtor and the creditor. A trustee is incidental and collateral, and not always essential. The real *contract* is between the *debtor* and his *creditors*—between, in this case, the sole stockholder of the Bank, and the Fire Loan bondholders. The passage and publication of the Act, in this case, amounts to the sealing and delivery of a deed, and completes a *contract*, which no subsequent Legislature, whether "representing the sovereignty of the State," or "in its capacity as sole stockholder," had the power to revoke.

So much for the first proposition.

Upon the second proposition I need not rely exclusively upon *American* authority. The facts apparent upon the record show a case on or before the 15th September, 1868, which made that a binding contract, that might possibly not otherwise have been so. I think we can show that even under the *English* version of the law, on which Chief

Justice Moses relies, it was in September, 1868, "*too late*" *to revoke.*

Complainants, (Dabney, Morgan & Co.,) filed their bill 30th October, 1867, in which they charged that the Bank interposed its obligation under the Act of 1865, as an obstacle in the way of the billholders, and prayed that this law, *insisted on by the Bank*, might be set aside as unconstitutional. "The President and Directors of the Bank," in their answer, sworn to by the President, and sealed with the seal of the corporation, the 31st January, 1868, and filed 3d Febuary '68, state "that they admit that *since December*, 1865, *they have endeavored to carry out the general purposes of the Act of that date*, referred to by complainants," They had for two years been engaged in executing the trust. They "submit," in said answer, "that the assignment of the assets of the bank was consummated as soon as the Act of the Legislature was ratified, in December, 1865." On the 25th February, 1868, Baring Brothers & Co. filed a petition in the Court of Equity for Charleston District, praying to be allowed to intervene for the purpose of defending their interest in this case. An order granting the prayer of the petition was granted the same day. On the 3d of March, 1868, certain orders in the cause were passed, among other things, allowing the bill to be amended so as to make the Attorney General of the State a party defendant for the purpose of sustaining and defending this very Act of '65, and directing that Baring Brothers & Co., holders of Fire Loan Bonds payable in Europe, and Maria Simmons, Jane V. Bowley, and Arnoldus Vanderhorst, holders of Fire Loan stock payable in America, should likewise be made parties defendant. On the 3d April, 1868, the Attorney General filed an answer, in which, "on behalf of the State, he claims for the Legislature of South Carolina, at least equal control over the assets of the Bank in which the State is the sole stockholder, with that exercised without question by the body of stockholders of a private bank, and he alleges that the Act

of 1865, is to all intents and purposes a *statutory assignment of assets for the benefit of creditors*, designating the order in which different classes of creditors shall be paid." Nothing was done to change the attitude of the State in regard to this matter, prior to the passage of the Act of September 15, 1868. The answer of Maria Simmons and Jane V. Bowley, Fire Loan stockholders, was filed April 16, 1868. The answer assumes the following position: "Defendants, therefore, claim that the postponement of bill-holders to the holders of Fire Loan bonds and stock, in the distribution of assets, made by the 11th section, the Tax Act of 1865, is not only *no* violation of contract, but that it was in *conformity with*, and the proper *sequence* to the legislation of 1838."

The answer of Baring Brothers & Co., was signed and sworn to before the American Consul at London, 7th May, 1868, and was filed, and of record in this case, in the Court of Equity, at Charleston, 26th May, 1868.

Here then we have evidence of the immediate acceptance by the trustee of the new trust imposed, and of continuous action under it, and in accordance with it for more than two years. We have the State, after a lapse of two years and a quarter, still insisting, by its Attorney General, that the Act of 1865 was *intended* as an assignment, and was *valid*, and *operated as such*. We have the second class of preferred creditors, putting in their claim to the benefit of said assignment; and lastly, we have Baring Brothers & Co. in behalf of the first class, coming in to bear the brunt of the hard fought and protracted litigation which has since ensued. On the 15th September, 1868, litigation, begun in '67, was being hotly and heavily pressed; the trustee, and all classes of creditors, together with the State itself, were before the Court, contending for the validity of the Act of 1865, and the assets and property of the bank had already been converted into a "fund in equity," to await the result.

At this stage of the proceedings, the Legislature under-

took to annul the Act of 1865, which was the subject of controversy, and to place the fund in the State Treasury. The Court, over which Chief Justice Moses presides, prevented the latter enormity, but strange to say, sustains the repeal. The two opinions do not harmonize, to say the least.

The Chief Justice seems to attribute to the injunction granted 3d March, 1868, a chrystalizing effect, which arrested all the parties just there and then, and to hold, that every thing done by the parties since that time does not count. That very decretal order, containing the injunction, gives leave to the Attorney General, to Maria Simmons and to Baring Brothers & Co., to come in and contest the complainants' claim, and are answers provided for by the Court not to be considered? Besides, the order expressly provides, "that the parties to these proceedings, now before the Court, and those who may hereafter be made parties, have leave to apply to this Court for any additional order or orders which may become necessary in the progress of the cause, the above orders not being intended to conclude or in any way prejudge the rights or equities of the parties to this suit."

We claim that all that appears in the pleadings prior to the decretal order of March 3, 1868, the decretal order itself, and all that appears of record, afterwards, up to the 15th September, 1868, is evidence in the cause, and taken together, proves that even if the Act of 1865 were, in its nature, revocable, it was *too late to revoke* in September, 1868. Burrill on Assignments, at p. 458, cap. 34, says of assignments otherwise revocable, "after the rights of creditors have once actually attached, or after notice of the assignment to those provided for by it, or after notice by the creditors to the assignee, of their desire and intention to avail themselves of the assignment, or *after they have taken steps to enforce the trust*, as by filing a bill, praying for a distribution of the fund according to the provisions of the

deed, and after any of the trusts have been actually executed, *it is too late to revoke the assignment.*"

The doctrine relied on by Chief Justice Moses is no where more strongly stated than by Rolfe, V. C., of England; yet he modified the doctrine as follows; See note to Bur. on Ass., p. 236. The Vice Chancellor says; "Nor does the creditor executing the deed become less a *cestui qui trust*, because he gives nothing to the debtor as a consideration for the trust created in his favor, or because it was the voluntary, unsolicited act of the debtor to create the trust." * * * "Where creditors have not executed the deed, questions have arisen how far, by having been apprised of its execution, and so, perhaps been induced to do, or abstain from doing something which may affect their interests, they may not *have acquired the rights* of *cestuis que trust.* * * * * * * * * * In the later case of Siggins vs. Evans, (32 English Law and Equity, 139,) it was decided, that the doctrine that a conveyance of property to trustees, in favor of creditors, operates as a mere power in the hands of mandataries or agents, revocable, *until communicated to* or *assented to by the creditors*, does not apply where the trustee himself takes a beneficial interest under the deed. And according to the same case, it seems that where a deed of assignment has been executed to a stranger, as trustee for creditors, *a communication of the trust to a creditor*, by reason of which he may not have pursued his remedy, or his position may have been altered, will *render the deed irrevocable* by the assignor, without any actual assent by any creditor."

In our case the trustee had accepted the trust, and in part executed it, the preferred creditors had been notified, had eagerly claimed and were actually in hot contest in the Courts for their rights, when the revocation took place. We repeat that it was "too late, too late!"

I have treated the points made by the Chief Justice of South Carolina, which alone give jurisdiction to this Court,

at length, and at the risk of being tedious. Under the old practice my duty would here cease.

The case of Murdock et al., vs. the City of Memphis, was ordered for re-argument before this Court in April last, on three propositions, one of which was as follows: "Is it the true intent and meaning of the Act of 1867, above referred to, that when this Court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide *all the questions presented by the record* which are necessary to a final judgment or decree?"

This being *unsettled*, I propose briefly to touch on the questions involved beyond the point which gives to the case its status here, but will endeavor to dispatch this portion of the argument more briefly than the preceding.

First, then, Chief Justice Moses throws out the suggestion, though he does not decide the question, that inasmuch as his court dec..red the Fire Loan Stock *not* to be a *debt of the Bank*, it is questionable whether the Act of 1865, even if otherwise valid as an assignment, was not vitiated by the fact that the Fire Loan Stockholders are made the 2d class of preferred creditors.

Burrill on Assignments lays down the law in the following passage, and gives the words of Ch. Tucker, of Virginia:

"There is no question that if a deed be fraudulent *in fact*, it is absolutely void *in toto*, and it is not permitted to stand as a security for what is really due, or for any purpose of reimbursement or indemnity. For deeds made of *purpose to defraud creditors or purchasers*, are, by the law itself, declared void. But where the deed is only *constructively* fraudulent it is *otherwise*." Burr. on Assignments, pp. 442, 443.

At pages 446, 447, it is declared that "an assignment may be valid as to *certain debts*, though *invalid as to others*. Thus in Virginia, a deed of trust executed in part to secure fraudulent debts, but in part to secure a bona fide debt, the bona fide creditor having no notice of the dishonest

purpose on the part of the grantor, was held to be a valid security for the bona fide debt." * * * And again, "in Alabama, where a deed of trust to secure a debt really and bona fide due, provides that after it is satisfied, a simulated debt, professedly owing to another person, shall be paid from the proceeds of the same property, the deed is not void as to the real creditor, if he did not participate in the fraud of the grantor."

I do not assign as error the over-ruling by the Supreme Court of South Carolina of Judge Carpenter's decision, that the Fire Loan Stockholders, in America, were, under the Fire Loan Act of 1838, made creditors of the Bank, equally with bondholders in Europe, but I do urge and insist that Judge Carpenter, if in error, erred along with every Legislature from 1839 to 1865, inclusive. It may be that Chief Justice Moses is right in this new view, but even he would not attribute "fraud *in fact*" to the Legislature of 1865, in adopting the views of its predecessors. This Fire Loan Stock, payable in the United States, which had always hitherto been considered a debt of the Bank, was in good faith, though perhaps in mistake, inserted among the Bank debts in the Act of 1865, second only to the European bondholders, whose debt fell due two years earlier. And everything being fairly and honestly *intended*, it cannot be that the rights of the bondholders are affected by an unintentional mistake on the part of the Legislature.

There is another point in which I not only do not attack, but earnestly sustain the Supreme Court of South Carolina. Judge Carpenter held the eleventh section of the Act of 1865 to be null and void, because in contravention of the provision of the State Constitution, requiring acts of the Legislature to treat of but one subject. The language of the Constitution is: Art. II, Sec. 20, "Every act, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title."

It is true, that it is ordered that all *Acts*, as well as *Reso-*

lutions of the nature of Acts, shall treat of but one subject, &c., but similar provisions in several other States have been held to be directory merely, and each State has hitherto been allowed in this respect to interpret its own Constitution. It would make wild work in South Carolina to decide ortherwise. The Supreme Court knew this, and without directly over-ruling Judge Carpenter's opinion, *assumed* that the act of 1865 was in itself valid, and relied solely and exclusively on the *repeal by the Act of* 1868.

It was further urged at the hearing, that the eleventh section of the Act of 1865 provides means "to raise supplies" for paying a portion of the public debt, a part of which (the interest) fell due during the current year, and that hence it was *germane* to the general purposes expressed in the title.

In addition, we submit that when the Legislature acted, *not* as "representing the sovereignty of the State, but as sole stockholder" in an incorporated Company, the Act of 1865 was a sufficient "letter of instruction" to "the President and Directors," whether good as a "law" or not.

At the hearing on the Circuit, and before the Supreme Court on appeal, the argument most urged and elaborated was the effect of sections 10, 11 and 12 of "the Act for rebuilding the City of Charleston," of 1838, and of Mr. McDuffie's mission, and agency, in creating a *lien* in favor of the Fire Loan Bondholders, independent of and prior to the Act of 1865. Unless it is intimated by the Court that they desire to hear that point further discussed, I am content to refer to Judge Carpenter's decree on the Circuit, (p. 71,) and to the opinion of the Supreme Court of South Carolina, delivered by Moses, Ch. J., (p. 87.) Judge Carpenter adopted substantially the argument presented by Counsel for the Barings, except as to the equality of the bondholders who negotiated with Mr McDuffie, and the stockholders who received no promises but those appearing in the Act itself. The exception of the bondholders to this view is expressed in their second ground of appeal, which is as follows :

"It is submitted, that if any lien was given by said Act securing that portion of the debt incurred by the State in issuing State stock, the lien was intended for the protection of the State, and not the holders of the stock. Neither the circumstances of the issue, nor the language of the scrip, imply any direct contract with the holders of the stock; and it was competent for the State, at any time before condition broken, to waive or postpone the lien intended for its own protection. According to the testimony, there has been no failure to pay the holders of this stock up to this day. The principal is not due, and the interest has been paid, latterly in gold. The stockholders cannot, therefore, claim by subrogation, there being no condition broken. The *Bonds* are past due, and no interest has been paid since January, 1868." p. 86.

Chief Justice Moses accepts or approves the argument of Judge Carpenter so far as the validity and efficiency of the lien created by the Act of 1838 is concerned, but limits the subject matter of the lien literally, to "*profits*," and as matter of evidence decides that no part of the present assets of the Bank consists of "*profits*," or is liable as "*profits*." It is respectfully submitted, that he failed to do away with the force of the authorities cited at the hearing, to wit:

In the case of *Stewart & Garnet*, 3 *Sim.*, 398, it was decided that a devise of the rents and profits of a plantation in Jamaica gave an absolute property in not only the land, but the slaves, stock, planting implements, etc.

Vice Chancellor Shadwell thus expresses himself at page 176, vol. 5, *Cond. Eng. Ch. Rep.*:

"The testator has given one moiety of the *rents, issues and profits* of his estate called Islington and Cove's Pen, to the children of his son, James Law Stewart, and the other moiety to his son, Robert Stewart, and his heirs. Now I understand the Pen to be that part of a West India estate which is used for the purpose of supporting the cattle employed on the plantation. The testator, in the commencement of his will, has described himself as resi-

dent in Jamaica, and I cannot but think that the words which he has used in this devise are equivalent to giving his *plantation* and *Pen*. Those words would pass every thing that was necessary to the enjoyment of the estate; and I am, therefore, of opinion that the Master has come to the right conclusion.

"As to the interest which the grandchildren take in the *real estate*, I am of opinion that they take a fee in the moiety devised to them. The devise of the *rents, issues, and profits of the estate is the same as a devise of the estate itself.*"

The decree in the above case contains the following: "Declare that the machinery, negroes, horned stock, mules, sheep and other cattle on the testator's plantation, called Islington and Cove's Pen, passed under the several devises of the moieties of the *rents, issues and profits* of the said estate, and are not assets for the payment of the legacies or annuities." This then, was the precise point decided. See, also, Inhabitants of Rehobath vs. Hunt, 1 *Pick.*, 24, "vote of *income* of land held to be a grant." "Devise of 'profit' will pass land." Allen & Blackmire, 2 Ves. and B. 74. The case at bar differs only in this, that there is not an *unconditonal* transfer of "profits." The Act of 1838 does not give an absolute property to the creditors. But, according to the principal decided in the above cases, the Bank itself, with all its property and assets, is *pledged*, "in the pledge of profits."

Pledged *until the debt for which they stand as security is paid*: and upon condition broken, the Court will order a sale of the entire corpus.

But still more directly to the point is the case of *Legard* and *Hodges*, 3d Brown's Ch. R., 531, where it is decided that "a covenant to appropriate one-third of the *produce* of real estate, to raise a sum of money, is not a mere personal covenant suable at law, *but creates a lien upon the land*, and the covenanters are entitled to have it *specifically performed.*"

A. H. covenanted that "he would set apart and appro-

priate as a fund, towards raising said £10,000, one third part of the clear yearly rents arising from his several estates in Berks and Oxford, etc.. etc., "and yearly pay the same to the plaintiff, his heirs or executors, *until the said* £10,000 should be paid." Lord Chancellor Thurlow pronounced judgment.

He says: "This bill was filed by the trustees in the marriage settlement, praying an account, and that they may be declared entitled, as trustees, to a third part of the produce of the estate of the defendant, Anthony Hodges.

"It is argued on one side that it is a mere personal covenant on the part of Hodges, upon which the plaintiff might bring an action against him, but that it did not create any trust of the estate.

"I take the doctrine to be true, that were parties come to an agreement as to the *produce* of land, *that the land itself will be affected* by the agreement."

* * "The plaintiffs, therefore, must be declared trustees as to one-third of this estate." *Legard and Hodges*, 3 *Brown's Ch. Rep.*, 531; (S. C., 1 *Ves.*, p. 447,) and affirmed on rehearing, (4 Brown Ch. Rep., 421,) where Ld. Ch. Loughbrough, who pronounced judgment, says, "The question is whether the covenant of the defendant, Hodges, to *set apart and appropriate a third part of the rents, etc,, was an equitable lien on that estate, the rents of which were so appriated?*"

This was undoubtedly the view taken by the Legislature for many years. A Committee of the Senate, in a report, in 1846, adopted by that body, says of the Act of 1838, as enforced by the negotiations of Mr. McDuffie, that "*this Bank* and its profits should be the security for the payment of the creditors in these loans." One of the resolutions adopted at the same time is still more explicit; it reads:

"2. *Resolved*, That when the State of South Carolina *pledged the profits and capital* of the Bank to her creditors, as a security for money borrowed, she did so in honesty of purpose and good faith." See Bk. compilation, 651 and

652. Such was the general language of the reports and resolutions from 1838 to 1868.

In argument before the Supreme Court, it was urged by complainants that a pledge of "profits" as to *personality* differs from a pledge as to *reality*, but no authority was adduced to sustain the distinction. In my judgment, the rule applies *a fortiori* to hypothecated bonds or stocks, or other choses in action. If these are pledged to pay a debt from the dividends, or interest accruing thereon, can they be withdrawn for other uses until the debt is paid?

In case the view of the Supreme Court of South Carolina is sustained, denying any lien or priority on the part of the Fire Loan Bondholders, a point in the answer of the Bank, urged at the hearing and again presented before the Supreme Court in appeal, becomes important. In the distribution of the *fund in equity*, there not being a sum sufficient to pay all the creditors *in full*, shall billholders' claims be estimated according to the face of the bills, or according to the amounts paid for them?

The argument below, which certainly has not been *answered* by either the Circuit Judge or the Chief Justice was as follows:

"If the billholders are allowed to come in with creditors generally, those who came by the bills since the insolvency of the Bank, can only claim what the bills cost them. See Collins vs. The Central Bank et al, 1 Kelly's Reports, p. 460, where Judge Warner says: "Independent of the decree itself, we are of the opinion that the clear equity of the case is in favor of distributing the fund among the respective billholders, in proportion to the *quantum* of consideration paid for the bills by the respective holders thereof. * * * Shall the billholder who paid ten cents on the dollar for his bills, exhaust the whole fund, or a majority of it, by receiving the full amount of his claims? that is to say receive one hundred cents on the dollar out of the fund, for which he only paid ten, while he who paid one hundred cents on the dollar for his claims gets no more?

In other words, has he who paid ten cents on the dollar the same equitable claim on the fund as he who paid one hundred cents on the dollar, when the fund is not sufficient to pay all?"

The decree of the Court in the case of *Collins vs. The Central Bank of Georgia, et al.*, concludes in the following words;

"Second. Because the court below committed error in deciding that the Bank bills should take, each in proportion to the value received by the Bank for it at the time of its emission by the Bank, it being the opinion of this Court that each bank bill should take in proportion to the *quantum of consideration paid therefor by the holder or claimant* on the fund; and that each holder or claimant should state the *quantum* of consideration actually paid therefor, on oath in writing, with the right of other contesting claimants for said fund to traverse the same." See likewise 2 Smith's Chan. Prac., 265.

If all the points involved in the case up to its final disposition are to be reviewed by the Court, I append the last paragraph of my argument at the hearing, for its consideration:

"The litigation has not originated with us. This suit was instituted by billholders, praying to set aside the Act of the Legislature of the State, passed in 1865, and to disregard the Act of 1838, as well as all the intermediate action of the Legislature on this subject between 1838 and the filing of the bill.

"From October, 1867, when the Bill of Dabney, Morgan & Co. was filed, to the passage of the Act of 1868, obliterating all the past action of the State, the State and the bondholders were in harmony. The bondholders came into the case to sustain what the State had done up to that time, which action had been attacked by the billholders.

"The only action of the State opposed by the bondholders (the Act of 1868), has been condemned by the highest legal tribunal of the State, and declared to be unconstitutional, null and void.

"It is submitted, then, that not only are the Fire Loan Bondholders entitled to the condemnation of the assets of the Bank to the payment, *pro tanto*, of their claim, but that they should *be relieved of all the burthens of a litigation* into which they have been dragged *in invitum*, and should have *refunded to them all expenses already incurred.*

I conclude with copying certain additional points submitted to the Supreme Court of South Carolina, after being served with the very elaborate printed argument, prepared by Mr. Magrath, counsel representing the Billholders:

"There are three fundamental fallacies on which the argument for complainants is based.

First. The question to be decided is treated as if it were a controversy between *debtor* and creditor—whereas it is in fact a controversy *between creditors.* So far as the Bank is concerned, personally, every contract constitutes an absolute debt, which the Bank unquestionably is bound to pay in full. It is bound to pay all creditors, of every class, to the last farthing—if it can.

So far as the "property and assets" of the Bank are concerned, these belong unquestionably to the creditors, when their relation to the Bank is considered. That is to say, the Bank cannot, either legally or morally, reserve, beneficially, to itself, anything whatever, without provision made for the payment of every lawful debt of every class.

The same principle applies to stockholders, or the State, as sole stockholder. The State has no right to appropriate to itself any portion of the property or assets of the Bank to the detriment, or against the will of a creditor, of any class.

These positions were maintained by me in the mandamus case, and sustained by this Court—the authorities relied on being the same now cited by the counsel for Billholders.

But the mandamus case decides *nothing* as to the rights of creditors *among themselves.* The cases cited have no application to liens and priorities among creditors.

Second. The second fallacy, on which appellant's argu-

ment is based, is this, that the right to take and appropriate to one's own use, is co-extensive with the right to pledge or mortgage, or discriminate between creditors. At page twenty-one, of the printed argument, the idea is thus expressed, viz: "If the State had the right to pledge, it had the right to take the assets of the Bank."

The true doctrine is that a corporation in debt, or otherwise, has the same dominion over its property that an individual has. It may buy property, and mortgage the property bought for the purchase money. It may pledge or hypothecate to secure a debt. It may, if done *bona fide*, and without contemplation of insolvency, sell, or even spend it, or dispose of it in any way not contrary to the charter. If the time comes when insolvency stares it in the face, the right of dominion is narrowed down. But the right of appropriating *among creditors*, preferring some and postponing others, *is preserved*. The right to *appropriate to its own use, or the same thing, to divide among its stockholders*, is *gone*. But the right to change the character of assets, to mortgage, pledge, hypothecate, or to pay one creditor rather than another, the right to provide for the payment of debts by assignment, with or without preference, still *remains unimpaired*.

It will be perceived to what extent these two fallacies alone affect the argument.

Third. The third fallacy, which is, perhaps, the most pervading, is the confounding the *general liability* of the property and assets of a debtor *for all debts*, with *liens* which attach to something *specific*. The general liability does not interfere with the general right of dominion on the part of the debtor. Within certain limits the debtor may spend profits on his pleasures. He may sell, mortgage, pledge, hypothecate, without stint. But a *lien* is a different thing. There something is "set apart" for a specific purpose, and he who holds the *lien* has a claim as well *ad rem* (if he can find it) as *ad personam*.

The claim of the Billholders, Depositors, etc., is *no lien*. It involves only the general liability. If otherwise, how, possibly, could an insolvent Bank assign for the benefit of creditors, *with preferences*.